THE LAW OF SALES.

VOLUME I.

COMMENTARIES

ON

THE LAW OF SALES

AND

COLLATERAL SUBJECTS.

BY

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IN TWO VOLUMES.

VOL. I.

BOSTON:

LITTLE, BROWN, AND COMPANY.

TORONTO:

THE CARSWELL CO., (LIMITED).

1892.

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UNIVERSITY PRESS :
JOHN WILSON AND SON, CAMBRIDGE, U.S.A.

IN GRATEFUL RECOGNITION OF THE MANY ACTS OF KINDNESS AND COURTESY
RECEIVED FROM THESE HONORED MEN, AND IN ACKNOWLEDGMENT OF
THE DEBT I OWE TO THEM FOR THE VALUABLE INSTRUCC-
TION THEY WERE ALWAYS SO READY TO IMPART,

I beg Respectfully to Dedicate this Work to the Memory of the

HON. JOEL PARKER, LL.D.,

HON. THEOPHILUS PARSONS, LL.D.,

HON. EMORY WASHBURN, LL.D.,

*So long the Esteemed and Estimable Professors of the Law School
of Harvard University.*

THE AUTHOR.

INTRODUCTION.

IN writing a treatise on Canadian Constitutional Law I found two cases, *Dobie v. The Temporalities' Board*,¹ and *Russell v. The Queen*,² decided by the Judicial Committee of the Privy Council of England, which, on a fair investigation of them, seemed to me to be so entirely unsound as to be absolutely indefensible. As the points involved in them are of the first importance in the construction of the Imperial Act³ which forms the Constitution of Canada, there was no other course fairly open to me than to undertake to show that these cases are not law. I have every reason to be satisfied with my success in such undertaking. After an exhaustive analysis of them, notwithstanding the high authority of the court by which they had been decided, and that they had been tamely accepted by the Provincial and Dominion courts as though there could be no question as to their soundness, I was driven to the conclusion, which I frankly expressed,⁴ that the cases were badly decided. I also hazarded the opinion that as then, for the first time, the unsoundness of those cases had been unanswerably demonstrated, the Supreme Court of Canada could no longer follow them, and the doubt was expressed whether the Judicial Committee themselves would continue to follow them. The sequel proved the correctness of the opinion, and the justification of the doubt.⁵

¹ 7 App. Cas. 136.

² *Ibid.*, 829.

³ British North American Act, 1867, 30 & 31 Vic. c. 3.

⁴ See Travis on Can. Const. Law, Part 2, pp. 133-178.

⁵ The question involved in those cases subsequently came before the Supreme Court of Canada in a case known as the

Dominion License Act Case, when, as was predicted, that court expressly repudiated *Dobie v. The Temporalities' Board* and *Russell v. The Queen*; Sir Wm. Ritchie, C. J., voicing the opinion of the whole court, saying of them: "We presume it will scarcely be considered high treason in us if we say those cases are not law;" and the court refused to follow them. (*a*)

(*a*) See, on file in the office of the Department of Justice, at Ottawa, Canada, the stenographer's report of the argument and proceedings in the Supreme Court of

Canada, on questions submitted to the court by the government, as to the constitutionality of the Dominion License Act, where the above facts were ascertained.

In precisely the same way, throughout the whole of this treatise, I have endeavored to point out the law on the numerous important questions I have discussed; and, notwithstanding the great amount of bad law I have found in cases decided in the courts in England and in this country, and which is repeated and perpetuated by text-writers, without the slightest attempt at exposing the most transparent fallacies which have stared them in the face, I feel quite satisfied that, from the commencement to the close of this work, there is not one of the many questions in connection with which I have pointed out much of such bad law, in which I have failed to show what the law on the particular subject really is.

On several of these questions I have had opportunities of eliciting the views of some of the ablest lawyers in the United States; some of them members of the Bench; some of them occupying the highest positions in connection with leading Law Schools; and others, leading practising lawyers, text-writers, and law-reviewers. Among all these I have failed to find one who has not assented to the soundness of the principles of law to which I directed their attention; while, on many of these most important subjects, I found a general expression of surprise, by those gentlemen, that they had not themselves previously noticed the transparent fallacies, the greater part of which are, for the first time, exposed in this work. Merely to recapitulate them would be to make an analysis of this entire work;

A copy of Travis on Can. Const. Law was sent to each member of the Judicial Committee of the Privy Council, and, on the question discussed in it, as to the unsoundness of their decisions in *Dobie v. The Temporalities' Board* and *Russell v. The Queen* — the question coming directly before them in the Dominion License Act Case — they held this act *ultra vires* the Parliament of the Dominion, and, in doing so, directly reversed their decisions in the previous cases referred to above. In coming from San Francisco, where this work was mainly written, to Boston, I met, on my way, Mr. Edward Blake, one of the ablest lawyers and statesmen in Canada, when, in a conversation between us, the following took place: —

"You observe, Mr. Blake, that the

Privy Council have sustained my criticism of their judgments."

"Yes, they did so, but they claimed not to do so."

"Yes, they claimed not to do so, but they did so notwithstanding."

Mr. Blake, very emphatically "Yes!"

As a clear matter of fact, on the ground on which the Privy Council decided, in *Russell v. The Queen*, that the Canada Temperance Act was *intra vires* the Parliament of Canada, they should have held, had their holding in that case been sound, that the Dominion License Act was also *intra vires* Parliament. But, in holding as they did that this latter act was *ultra vires*, they directly reversed their previous holding in *Dobie v. The Temporalities' Board*, and in *Russell v. The Queen*.

but, among the many gross legal fallacies I have undertaken, and I think with success, to clearly expose, I may here direct special attention to Book III. of this work, Part I., where the unsound doctrine is exposed, attempted to be established by the courts of New York (followed in Kansas and Nebraska, and, more remarkably, from the general trend of their own decisions there, by Pennsylvania), that railway companies are liable, on the fraudulent traffic receipts of station agents, for goods which have not been received by the railway, where bills of exchange based on such fraudulent receipts have been sold by a party to the fraud. This utterly unsound doctrine is based on the perversion of a principle of agency, which, if generally applied, would involve the destruction of very much of the most unquestionable law of principal and agent. As I have shown in that Part, not only are the recent New York decisions on the main subject unsound; not only in reaching such decisions do they pervert and destroy a sound principle of the law of agency; but, in principle, those cases are opposed to the decisions of the well-decided cases in New York running over a period of three quarters of a century. To all interested in the liabilities of carriers, directly or indirectly, I particularly direct attention to Book III., Parts I. and II., of this work.

In Book IV., Parts VI. and VII., I have most elaborately discussed that branch of the seventeenth section of the Statute of Frauds relating to the acceptance and actual receipt of a part of the goods purchased, to take the case out of the statute; and the reader, on studying those Parts, can scarcely fail, I think, to be astounded at the fact, and its effect, of the "acceptance" of the statute as an entity, apart from and independent of the "actual receipt" of the statute, being so long and so generally ignored, as it has been, by courts and text-writers both in England, and in this country. But, even beyond these, I would particularly direct attention to the subject, thoroughly investigated in Book IV., Part VIII., where the fallacy of the courts in Massachusetts, Maine, Vermont, Michigan, and some half-dozen other of the States of the Union, which affect to hold that in the note or memorandum in writing of a contract, such as is required in the fourth and seventeenth sections of the English Statute of Frauds, the consid-

eration need not appear, is, I think, conclusively and unanswerably established. Not only so, but, by a very full and accurate analysis of the cases in those States, I have shown that while such courts affect to hold this doctrine, and although, in several of those States they have actually enacted statutes expressly providing that in such notes or memoranda the consideration need not appear, yet, in the very face of the cases affecting to hold the doctrine that the consideration need not be so stated, and in the very teeth of those statutes, they still hold, in fact, *that the consideration must so appear*, or that the Statute of Frauds is not satisfied. They involve themselves in this state of confusion by confounding *the consideration*, the *quid pro quo* of Noy's Maxims — the "this for that," the "this" which one gets or is to get for the "that" which he gives or is to give — with the *mutuality*, the *aggregation*, the meeting of minds of the parties to the contract; which latter the statute does not require to be evidenced by the writing.¹

Throughout the whole work questions connected with the Law of Sales, and subjects collateral thereto, are examined with absolute candor and perfect fearlessness. The one object I have had in view in my work is to state the law as it actually is; and where I have

¹ The confusion which exists on this subject is made apparent by its discussion in Book IV., Part VIII. This is one of the subjects which I have considered in Massachusetts and elsewhere with members of the Bench, law-reviewers, leading law-school professors, law-book writers, and prominent lawyers; not one of whom have I found to dissent from the views I have expressed on the subject. I had the opportunity for a very full consideration of the question with the senior professor of one of the law schools of this country, and who has since taken a seat on the Supreme Court Bench of his State, who entirely assented to my views, and who, I subsequently ascertained, gave expression to them in his lectures to his law-students. In a conversation with one of the Supreme Court judges of Massachusetts, a fellow law-student with me at Harvard, on my stating the law in the matter to him, he replied: "Oh, that is settled in this State by statute;" to which I answered: "I am quite aware of that, and yet, right in the teeth of your statute, you hold that the consideration must appear by the writing." He was silenced.

The remarkable feature about the matter is, that the absurdity has never been exposed until now. Browne, in his generally very excellent work on the Statute of Frauds, was, as we show, *post*, vol. ii. pp. 521-523, 525, 541, 568, fairly puzzled in the matter, and very naturally so, by the glaringly contradictory decisions in the courts of his own State, and hence inferred that the *price* paid for goods is not *the consideration* for the goods. The ordinary form of a deed of land shows the contrary: "For and *in consideration* of \$1,000, I grant, etc., that certain lot, piece, etc., of land." The consideration for the land is the price; the consideration for the money paid is the land. The consideration is the *quid pro quo*. And yet, as we point out in Part VIII. of Book IV., the very courts which hold that the consideration need not appear by the writing, hold, that *all the essentials* of the contract, *including the price*, must appear by the writing. *Ergo*, they hold, and their statutes enact, that the consideration need *not* appear by the writing, and yet they hold that *it must appear* by the writing.

found unsound decisions, as I have done in every branch of the law, I have not hesitated to point them out, and to show, with all the distinctness and conclusiveness in my power, that they are not well-decided, and are not law. In a thorough review of the work I know of no instance where I have failed to make the law of the subject perfectly clear to any reader of fair intelligence. The work is an absolutely new one on the subject; not a rehash of Blackburn, Benjamin, or any other writer; and I trust it will prove to be of no little value to courts, lawyers, and law students. Within its limits it is complete and thoroughly exhaustive; but I hope hereafter to issue two additional volumes, covering a variety of other questions connected with the Law of Sales which I have left over for later consideration and discussion. If the work shall prove of value it will be owing in no slight degree to the instruction I received from the able lawyers to whose memory the work is dedicated, and from whom I learned to judge cases by principle, and like them to act on the principle that "law is the very reason of the thing," and that "that which is not reason is not law."

J. T.

BOSTON, MASS.,
January, 1892.

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COMMENTARIES ON SALES.

BOOK I.

PART I.

WHAT IS A SALE ?

IN an attempt intelligently to discuss the subject of Sales of Personal Property, we are met, at the very threshold of the subject, with a difficulty which requires to be removed. With reference to what is a sale of personal property, the authorities would seem to be well-nigh irreconcilable, and we have not met with any reasonable attempt to reconcile or otherwise to place on a satisfactory basis the contradictory definitions of a sale which courts and text-writers furnish us; some of them treating a sale as differing from, and others as being in effect the same, as a barter or exchange. We think the weight of reason and authority is with the latter view.

Blackstone treats them as in effect the same. That able commentator says, "Sale, or exchange, is a transmutation of property from one man to another, in consideration of some price or recompense in value; for there is no sale without a recompense; there must be *quid pro quo*."¹ If it be a commutation of goods for goods it is more properly an exchange; but if it be a transferring of goods for money, it is called a sale, which is a method of exchange introduced for the convenience of mankind, by establishing a universal medium which may be exchanged for all sorts of other property; whereas, if goods were only to be exchanged for goods, by way of barter, it would be difficult to adjust the respective values, and the carriage would be intolerably cumbersome. But with regard to the law of sales and exchanges there is no difference. I shall therefore treat of them both under the denomination of sales only."²

¹ Noy's Max., c. 42.

² 2 Blk. Com., 446. 1 Chitty on Con., 518, is to the same effect.

Kent, the American Blackstone, takes the same view. He says: "A sale is a contract for the transfer of property from one person to another for a valuable consideration."¹ So, too, that other very high authority on the law of sales, Mr. Justice Blackburn, says: "A contract concerning the sale of goods may be defined to be a mutual agreement between the owner of goods and another, that the property in the goods shall for some price or consideration be transferred to the other, at such a time and in such a manner as is there agreed. If the consideration to be given for the goods is not money, it might, perhaps, in popular language, rather be called barter than sale; but the legal effect is the same in both cases."²

And a still later English writer on the same subject says:—"Sale, according to the civil law in the time of Justinian, and according to the modern systems of law which avowedly adopt the principles of the civil law, is considered as a contract between the owner of a thing and another person, whereby the parties consent to the transfer of property in the thing from the one to the other, and the payment by the latter to the former of a certain sum of money (price). In English law, sale, considered as a contract, differs from the above definition in this, that the obligation contracted by the second party is not necessarily payment of a certain sum of money, but may consist of the render of value of any description. . . . Sale, considered as a contract, may be defined, agreeably to English law, as

"An agreement made between a person having power to dispose of the property in a thing (who is called the seller), and another person (called the buyer), with the joint intention, expressed as by law required, that the property in the thing shall, at such time and in such a manner as is then specified, be transferred to the buyer in consideration of value to be rendered by the buyer, and *vice versa*."³

These, with which we concur, we give as instances of definitions of a sale, where a sale is treated as in effect the same as a barter or exchange. As instances where, with equal positiveness, sales are treated as differing essentially from a barter or exchange, we furnish the following:—

Mr. W. W. Story, in his work on Sales, says: "A sale is a transfer of the absolute title to property for a certain agreed price. It is a contract between two parties, one of whom acquires thereby a property in the thing sold, and the other parts with it for a valuable consideration. If the property in any commodity be volun-

¹ 2 Kent's Com., 468.

³ Campb. on Sales, 1, 2. London, A. D.

² Blackburn on Sales, Introduction, ix. 1881.

tarily transferred without a valuable consideration, it is a gift; if one article be exchanged for another, it is a barter; but a sale takes place only when there is a transfer of the title to property for a price;"¹ treating a "price" as a price in money.

For this, Story cites Blackstone, Comyn, and the civil law. But, as we have seen, Blackstone holds that "with regard to the law of sales and exchanges there is no difference."² Comyn is quite as far from being an authority for Story's position; the language of that old writer being, simply, "If a man sell his goods to another, the property vests in the vendee."³ And, as intimated by Campbell, from whom we have quoted,⁴ the civil law is essentially different on that point from ours; the distinction taken by the civil law⁵ between "natural contracts" and "civil contracts," under which the question was raised and was long open, being not at all regarded by the common law.⁶ Another highly respectable American writer says: "A sale of a chattel is an exchange thereof for money; but a sale is distinctly discriminated in many respects from an exchange in law, an exchange being the giving of one thing and the receiving of another thing; while a sale is the giving of one thing for that which is the representative of all values."⁷

The authority cited for this is one we have already adduced,⁸ in referring to the distinction existing in the matter between the common and the civil law. We think Salkeld, fairly considered, is an authority the other way. His language is "*Permutatio vicina est emptioni*," but exchanges were the original and natural way of commerce, precedent to buying, for there was no buying till money was invented; now, in exchanging, *both parties are buyers and sellers, and both equally warrant.*"⁹

¹ Story on Sales, 1.

² 2 Blk. Com., 446.

³ Com. Dig., *Biens*, D. 3.

⁴ Campb. on Sales, 1.

⁵ Anonymous, 3 Salk. 157.

⁶ See Gaius, lib. iii. 140; Inst., lib. iii. c. 23; Dig., lib. xviii. c. 3.

⁷ 1 Pars. on Con., 521. 2 Addison on Con., 865, is to the same effect; but his citation, as an authority, from Pothier, Obligations, No. 6, has reference only to the well-known civil-law rule, and is not applicable to the common-law system.

⁸ Anonymous, 3 Salk. 157.

⁹ Pothier, although claiming that a sale is essentially different from an exchange, in effect shows, as in the case in Salkeld, that an exchange is really two sales, in which each of the things is both the thing sold and the price, and each of the contracting parties is both seller and

buyer. His language is: "The contract of exchange bears some resemblance to the contract of sale. It held the place of that contract before the use of money, which gave birth to the contract of sale; for which reason the Sabanians thought that an exchange was a true contract of sale. D. 18, 1, 1. The opinion of the Proculians, who decide that the contract of exchange is different from the contract of sale, is more correct. The principal difference is, that in the contract of sale we distinguish the thing and the price; we distinguish between the contracting parties, one of whom is the seller and the other the buyer. On the contrary, in the contract of exchange each is both the thing and the price; each of the contracting parties is both seller and buyer. D. 18, 1, 1, § 1; D. 19, 4, 1." Poth. on Sale, Cushing's Trans., Pt. 7, art. 5, pl. 620.

As in an exchange or barter "both parties are buyers and sellers," for which, in the case in *Salkeld*, we have express authority, then this important point, which we have failed to find elsewhere noticed, results, that as the parties are *buyers and sellers* there is necessarily "a sale;" and not only so, but as both the parties are buyers and both are sellers, there is a double sale, containing not only the usual ingredient of a sale, that both as sellers "equally warrant" the subject of their respective sales; but all the other ingredients of a sale, including the evidence required by the statute of frauds, would pertain to each of the sales covered by that which, prior to the invention of money, was the only kind of commerce¹ known, and which was then alone known as exchange or barter, and of which our modern sales are the legitimate issue; each of the sales in a barter or exchange thus possessing all the essential elements, and being governed virtually by the same laws, as in the case of a single sale.²

¹ The word "trade," in its broadest signification, includes not only the business of exchanging commodities by barter, but the business of buying and selling for money, or commerce and traffic generally. *May v. Sloan*, 101 U. S. 231.

² "A sale is simply a transfer of property for a consideration." *Wilson, arguendo*, in *Anglo-Egyptian Navigation Co. v. Rennie*, L. R. 10 C. P. 276. And even *Benjamin* (see sec. 2, *Benj. on Sales*), in elucidating the distinction between a sale and a bailment, cites *South Australian Insurance Co. v. Randell*, L. R. 3 P. C. 101, where a sale and a barter or exchange are treated as identical, and where, following *Sir William Jones*, it was held, that "wherever there is a delivery of property on a contract for an equivalent in money, or some other valuable commodity, and not for the return of his identical subject-matter in its original or an altered form, this is a transfer of property for value,—it is a sale, and not a bailment."

So, popularly, "All the world is a market, and it is a market all the time; and all the men and women are buying and selling all the time. The barter never ceases; we are constantly offering something in exchange for something else, and constantly having like bargains pressed upon us. . . . A genuine smile generally brings its price in a genuine smile back. Somebody has saluted me respectfully, and that person is paid in his own coin" (i. e., smile for smile; respect for respect; a barter, yet a sale; the essential *quid pro quo* of a sale not being wanting. Anonymous, 3 *Salk.* 157). *Rose C. Cleveland's Studies, Reciprocity*, 14th ed. pp. 27, 31.

Again, "When innumerable unrelated and independent persons produced the various things needful to life and comfort, endless exchanges between individuals were requisite in order that they might supply themselves with what they desired. These exchanges constituted trade, and money was essential as their medium. But as soon as the nation became the sole producer of all sorts of commodities, there was no need of exchanges between individuals that they might get what they required." *Bellamy's Looking Backward*, p. 118. Here "exchanges" is treated as merely another name for sales. "Already accustomed to accept money for commodities, the people next accepted promises for money, and ceased to look at all behind the representative for the thing represented. Money was but a sign of real commodities, but credit was but the sign of a sign." *Ibid.*, p. 329.

"Money is merely a tool for the small payments of society; while all the large transactions of trade and finance are settled by checks, notes, bills of exchange, with transfer of book accounts." *Henry Clews*, in *North American Review* for January, 1891, p. 111.

"The function of money, whether of gold, silver, paper, or other materials, is to measure the value of things to be exchanged; to aid in effecting exchange." *Hon. Roger Q. Mills*, in *N. Am. Rev.* for May, 1890.

And again, from "Money, and the Mechanism of Exchange," by Prof. W. Stanley Jevons, M. A., F. R. S., —

"The earliest form of exchange must have consisted in giving what was wanted directly for that which was wanted.

Still another authority for a definition, which, in effect, is the same as that of Parsons, and which we think is a little worse than that of Story, we get from a well-known English work by an American writer, Benjamin on Sales. Benjamin defines "a sale of personal property" as "a transfer of the absolute or general property in a thing for a price in money."¹ The learned

This simple traffic we call 'barter,' or 'truck,' the French *troc*, and distinguish it from sale and purchase, in which one of the articles *exchanged* is intended to be held only for a short time, until it is parted with *in a second act of exchange*. The object which thus temporarily intervenes in sale and purchase is money. At first sight it might seem that the use of money only doubles the trouble, by making *two exchanges* necessary where one was sufficient; but a slight analysis of the difficulties inherent in simple barter shows that the balance of trouble lies quite in the opposite direction. . . . In the present day barter still goes on in some cases, even in the most advanced commercial countries, but only when its inconveniences are not experienced. Domestic servants receive part of their wages in board and lodging; the farm laborer may partially receive payment in cider or barley, or the use of a piece of land. It has always been usual for the miller to be paid by a portion of the corn which he grinds. The truck or barter system, by which workmen took their wages in kind, has hardly yet been extinguished in some parts of England. Pieces of land are occasionally exchanged by adjoining land-owners; but all these are comparatively trifling cases. In almost all *acts of exchange* money now intervenes in one way or other. And even when it does not pass from hand to hand, it serves as the measure by which the amounts given and received are estimated. *Commerce begins with barter, and in a certain sense it returns to barter*; but the last form of barter [the modern sale] is very different from the first form. By far the greater part of commercial payments are made at the present day in England apparently without the aid of metallic money; but they are readily adjusted, because money acts as the common denominator, and what is bought in one direction is balanced off by what is sold in another direction."

Under statutes regulating or prohibiting the sale of intoxicating liquors, statutes of limitation, statutes of fraud, and other analogous statutes, sales and barter or exchanges are treated as in effect the same, and payments in specific articles are held to be payments within the meaning of such statutes. See cases

cited, *infra*, in connection with our discussion of the statute of frauds. So, too, money itself is also treated as a commodity, — the subject of a purchase and sale. See *Bronson v. Rodes*, 7 Wall. 229; *Faw v. Marsteller*, 2 Cranch, 10; *Treblecock v. Wilson*, 12 Wall. 687; *Taup v. Drew*, 10 How. 218; *Cheang-Kee v. United States*, 3 Wall. 320; *Parker v. Davis*, 12 Wall. 457; *Hepburn v. Griswold*, 8 Wall. 606; *Waruhold v. Schlichting*, 16 Iowa, 244; *Shoenberg v. Watts*, 10 Am. Law Reg. 553; *Wood v. Bullens*, 6 Allen, 516.

¹ Benjamin qualifies this with the supplementary remark that it is "a price in money paid or promised." If the *promise* be in writing, it usually takes the form of a promissory note, which is not money. But his remark, even from his own point of view, would require to be still further supplemented. If the price, in order to make the transaction a sale, may be money promised, as by a promissory note, it is evident that the definition must be still further opened, and *ordered* or *requested* be also added, in order to cover and include as sales those large and important transactions where the payment is made not strictly in money or promissory notes, but in checks, drafts, or bills of exchange. The definition which limits a sale to the one case of a price strictly in money is the very worst of all the definitions of a sale. The learned author evidently gave the matter but little thought. The definition and extension of it were obviously, although not credited by him, adopted from some of the old common-law writers. See *Williamson v. Berry*, 8 How. 544, where the language is identical with that used by Benjamin; and where Noy's Max., c. 42, and Shep. Touch., 244, are quoted. But these authorities merely mean that to constitute a sale there must be a consideration, — a *quid pro quo*. Thus Noy says: "In all bargains, sales, contracts, promises, and agreements, there must be *quid pro quo*." Noy's Max., c. 42, p. 87. And, "It is a general learning that there must be in every contract *quid pro quo*, viz., some valuable consideration between the parties to be paid or performed, either presently or at a day to come; or else some earnest to be given presently, otherwise the contract is void; for *ex nudo pacto non oritur actio*." *Ibid.* Again,

writer, in the preface to his first edition, and in other parts of his work, intimates that he follows and virtually incorporates in his work, Blackburn on Sales. As regards this definition, it is certainly a most radical departure from that of Blackburn, and, we think it is, in two important respects, very far from being an improvement on the definition of one of the very ablest of England's judges, the author of Blackburn on Sales, Mr. Justice Blackburn; whose definition we repeat, in order to place it in direct juxtaposition with that of Benjamin. It is, — "A contract covering the sale of goods may be defined to be a mutual agreement between the owner of goods and another, that the property in the goods shall, for some price or consideration, be transferred to the other, at such a time and in such a manner as is there agreed. If the consideration to be given for the goods is not money, it might, perhaps, in popular language, rather be called barter than sale; but the legal effect is the same in both cases."¹

In this same connection, and as being, we think, a still better definition than that of Blackburn, we requote from the later English book on Sales,² and adopt, as one which we think entirely correct, the definition which we have already quoted approvingly: —

"Sale," says Mr. Campbell, "considered as a contract, may be defined agreeably to English law, as

"An agreement made between a person having power to dispose of the property in a thing (who is called the seller) and another person (called the buyer), with the joint intention, expressed as by law required, that the property in the thing shall, at such time and in such manner as is then specified, be transferred to the buyer in consideration of value to be rendered by the buyer, and *vice versa*."

The essential errors made by Benjamin in his definition, we think, are, first, in stating that the consideration for a sale must be "for a price in money;" and second, in simply defining it "as a transfer" of the property in the thing sold; omitting the fact, insisted upon in the better definitions of Kent, Blackburn, and Campbell, of its being a mutual *contract* between the parties for the transfer, etc. Thus while on the latter ground the definitions of Blackstone and Benjamin are fairly open to the criticism of one of the ablest of the American judges,³ the better definitions

"Bargain and sale doth signify the transferring of the property of a thing from one to another upon valuable consideration. And herein only it doth differ from a gift, — that this may be without any consideration or cause at all, and that hath always some meritorious cause mov-

ing it, and cannot be without it." Shep. Touch., c. 9, p. 221.

¹ Blackburn on Sales, Int., ix.

² Campbell on Sales, 2.

³ Bigelow, C. J., in *Gardner v. Lane*, 94 Mass. 43, 44, where he says: "The ordinary definition of a sale, as a trans-

of Kent, Blackburn, and Campbell, in which the sale is defined as a "contract," etc., are not open to such objections. The sale being a "contract," parties capable of contracting, mutual assent, legal subject-matter of contract, and the consideration, are all pre-supposed, as well as the other requirements necessary to make it a legal contract.

One very serious evil resulting from leaving out of sight that a sale is a contract, and embodies all the essential ingredients of a contract, will be adverted to more fully hereafter. It is sufficient to say on the point here, that as in *all* contracts, the *intention* of the parties, or, in other language, their *mutual assent*, is what is to govern in the construction of the contract of sale; and in determining what the contract of the parties is, such intention or mutual assent as much affects the contract of sale, as it affects any other contract. It is, therefore, not at all a matter of surprise, that, where courts and text-writers have ignored such plainly manifested intention as a governing principle, and have substituted for it, for instance, such tests as the weighing or not weighing, the measuring or not measuring, goods alleged to have been sold, in order to decide whether the property in such goods has or has not passed, the most inextricable confusion has been the result.

Benjamin's other mistake in his definition is not less serious. Following up his definition, he adds,—"If any other consideration than *money* be given, it is not a sale."¹ A definition of "*money*" in the sense in which it is used in the definition of sale referred to, must entirely exclude, not only all representatives of money, such as bills of exchange, promissory notes,² etc., but it must also, to make the definition of a sale as distinguished from an exchange or a barter of any value, also exclude all such

mutation of property from one person to another for a price, does not fully express the essential elements which enter into and make up the contract. A more complete enumeration of these would be,—competent parties to enter into a contract, an agreement to sell, and the mutual assent of the parties to the subject-matter of the sale and to the price to be paid therefor. Thus, it cannot be doubted that if, under a contract of sale, a delivery was made through mistake of an article different from that agreed upon by the parties, there would be no sale of the article delivered, and no property in it would pass, for the simple reason that the vendor had not agreed to sell nor the vendee to buy it. There would, in fact, be no contract between the parties in respect to the ar-

ticle actually furnished; or, to express it in different words, when a material mistake occurs in respect to the nature of the subject-matter of a sale, there is no mutual assent, and therefore the contract is void."

¹ Benjamin on Sales, 2.

² Where goods are sold upon a contract to pay for them by a bill, and a bill is given, the price cannot be recovered until the period of the bill has elapsed; but if default be made in giving the bill, an action will lie at once to recover the present value of such a bill. *Mussen v. Price*, 4 East, 147; *Dutton v. Solomonson*, 3 B. & P. 582; *Brooke v. White*, 1 B. & P. N. R. 330; *Helps v. Winterbottom*, 2 B. & Ad. 431.

money as can be treated as a commodity. Really, this would exclude from "money," all else than that which could strictly be classified as legal tenders in the *loci contractus*. Without going even to this length, it seems that, as a matter of strict accuracy, only five per cent of the business of this country is transacted with "money."¹ It is, therefore, perfectly clear, that materially over ninety-five per cent of what in this country are usually considered sales would not come within the definitions of sales furnished us by the learned authors of Parsons on Contracts and Benjamin on Sales.

The authorities usually relied on² to show that a distinction exists which would sustain such definitions, are little more than to the effect that, under the old and now generally obsolete rules of pleading at common law, the declaration, where the goods sold were to be paid for in specific articles, in labor, etc., use to be on the special contract and not in *indebitatus assumpsit*. But as the same rule applied where the payment was to be by a bill of exchange, etc.,³ all of these sales, representing the vast majority of the sales of all civilized countries, in modern times, would have to be taken out of their ordinary category of sales, and, with the law surrounding them, be relegated to the exchange and barter of the text-writers, who exclude these from the ordinary legal effect attaching to them under the modern law of sales.⁴

¹ Speech by Senator Farwell in the Senate, on April 16, 1888.

² See *Harris v. Fowle*, cited in *Barbe v. Parker*, 1 H. Blk. 287; *Keys v. Harwood*, 2 C. B. 905; *Hands v. Burton*, 9 East, 349; *Harrison v. Luke*, 14 M. & W. 139; *Sheldon v. Cox*, 3 B. & C. 420; *Guerreiro v. Peile*, 3 B. & Ald. 616; *Forsyth v. Jervis*, 1 Stark. 437; *Read v. Hutchinson*, 3 Camp. 532; *Mitchell v. Gill*, 12 N. H. 390; *Vail v. Strong*, 10 Vt. 457; *Sheldon v. Cox*, 3 B. & C. 420.

³ By the old rules of pleading at common law, a note which was payable at a particular place must be so described in the declaration, and if described as payable generally it was a fatal variance. *Carington v. Comstock*, 14 Peters, 43. See 2 Ch. Pl. 239, 16 Am. ed., for form of count for not accepting bill of exchange for goods bargained and sold.

⁴ In an action for the penalty of the statute, 12 Anne, c. 16, the declaration stated a specific sum of money to have been lent (in which the usury consisted); but the evidence was that the loan was part in money and the rest in goods of a known value, which the party receiving the loan agreed to take as cash. This was held good evidence to support the declara-

tion. *Barbe v. Parker*, 1 H. Blk. 284. In this case goods were taken as cash, and the court treated them as money. Lord Loughborough said: "You have agreed to take it, not as goods, but as money. You may make the goods represent money, as well as money represent goods. A. delivers this piece of goods not as a commodity to be sold, but as a thing of specific value, as an aliquot part of the money, and B. so takes it. Then, with respect to him, this is to be taken as constituting so much of that common measure of the value of the commodity. It is making the commodity itself stand in the place of the thing which constitutes the value." *Hands v. Burton*, 9 East, 349, is to the same effect. There it was held that proof that the defendant agreed to sell his horse to the plaintiff for £31 10s., and at the same time agreed that if the plaintiff would take the horse at that value, he, the defendant, would buy another horse of the plaintiff's brother for £14 14s., and that the difference only should be paid to the defendant, will support a count charging only that, in consideration that the plaintiff would buy of the defendant a horse for £31 10s., the defendant did buy the horse for that price, and did pay to the defendant the said

We cannot better conclude our discussion of this matter which lies at the very basis of the law of sales, than by again quoting

£31 10s. Lord Ellenborough here said: "The parties agreed to consider the brother's horse as fourteen guineas in their mode of reckoning the payment for the defendant's horse; but still the consideration for the latter was thirty guineas, and the defendant received thirty guineas in money and value." But where money is lent by a cheque upon a banker without a previous agreement to consider the cheque as money, it is no loan, so as to constitute usury, till cash is actually received. *Brook v. Middleton*, 1 Campb. 445; *Borrodale v. Middleton*, 2 Campb. 53. In *Barbe v. Parker*, 1. H. Blk. 287, the distinction is taken that where part of a contract for goods is to be paid for in other goods, the party shall not be permitted to recover the whole in money by saying the other goods were money; but where there is a contract for the loan of money, and part of it is given in goods which are taken as money, the party giving them shall not be permitted to deny that the contract was for money, or deny that the contract was proved by such evidence. See *Cudlip v. Rundle*, Carth. 202; *Bristow v. Wright*, Doug. 665, note a; *King v. Pippet*, 1 T. R. 235; *Carlisle v. Trears*, Cowp. 671. As stated by us in the text, the difference between money and goods treated as money is little more than a matter of pleading, as far as the legal effect is concerned. Thus, in *Campbell v. Sewell*, 1 Ch. 609, 611, on the doctrine that in an action for goods sold and delivered which are to be paid for part in money and part in other goods, the plaintiff must declare upon the special contract, because he cannot separate the one from the other and go for the value of the goods generally, it was held that the same principle applied to a promise to pay for goods sold part in cash and part by bills of exchange. See further, *Mussen v. Price*, 4 East, 147; *Hoskyns v. Duperoir*, 9 East, 498, 501; *Nickson v. Jessom*, 2 Stark. 227; *Hickling v. Hardey*, 7 Taunt. 312; *Lee v. Ridson*, 6 Taunt. 188. In *Sheldon v. Cox*, 3 B. & C. 420, A. agreed to give a horse warranted sound *in exchange* for a horse of B. and a sum of money. The horses were exchanged, but B. refused to pay the money, pretending that A.'s horse was unsound. It was held that it might be recovered on an *indebitatus* count for horses sold and delivered. Where by the terms of a contract a service to be performed by A. for B. is to be paid for in goods, A. cannot declare in debt for the value of the service, but must sue on the special contract. But if B. by

his own act render the delivery of the goods impossible, A. may sue in debt for the value of the service, as he can do if B. allow the goods to be sold under an execution against him. *Keys v. Harwood*, 2 C. B. 905. See *Baines v. Payne*, 1 Ch. Pl. 357; *Sir Anthony Maigne's Case*, 5 Co. 20, and, in error, Co. Ent. 244. In *Harrison v. Luke*, 14 M. & W. 139, where there was an agreement to exchange goods for goods, and part of the goods on one side was not delivered, it was held that the action must be on the special contract. But upon an agreement between two traders to supply each other, on the footing of goods for goods; after a balance is struck between them, such balance is recoverable in money, where there is evidence of an agreement that the balance shall be paid in goods. *Ingram v. Shirley*, 1 Stark. 185. And see *Garey v. Pyke*, 10 A. & E. 512. And in *Forsyth v. Jervis*, 1 Stark. 437, where B. agreed to purchase of A. a gun for the sum of forty-five guineas, but it was stipulated that A. should take a gun of B.'s, valued at thirty guineas, in part payment; B. having refused to deliver his gun and complete the contract, Lord Ellenborough held, that since the contract was for the sale of goods to be in part paid for by the delivery of goods of a stipulated value, upon the refusal of the purchaser to pay for them in that mode, a contract resulted to pay for them in money.

The 25th section of the English Companies' Act, 1867, provides that "Every share in any company shall be deemed and taken to have been issued, and to be held, subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the registrar of joint stock companies at or before the issue of such shares." In *In re Limehouse Works Co.*, Coates's Case, L. R. 17 Eq. 169, it was claimed, but not established, that the necessary instrument under the Act had been filed to sustain a payment for shares which was not literally in cash. Having failed in that, it was then claimed, under the following facts, that the payment for the shares met the requirements of the Act. The memorandum of association of the company, formed for the purpose of purchasing and carrying on the business of C., was subscribed by him for 2,500 shares, which were of £1 each. It was also subscribed by other persons, by which the number taken amounted to 6,265, out of a total capital of 7,500 shares; and the

from a learned American judge,¹ whose judgments are always worthy of the most careful consideration. Says Mr. Justice Bigelow, in questioning whether there can be any doubt whether an exchange can be deemed a sale at common law: "The distinction between a sale and exchange of property is rather one of shadow than of substance. In both cases the title to property is absolutely transferred, and the same rules of law are applicable to the transaction, whether the consideration of the contract is money or by way of barter. It can make no essential difference in the rights and obligations of parties, that goods and merchandise are transferred and paid for by other goods and merchandise instead of by money, which is but the representative of value or property."²

company could only issue fresh shares by special resolution. The articles of association stated that an agreement had been prepared between C. and the company for the sale of the business to the latter for £5,000, of which one-half was to be fully paid-up shares of the company. This agreement was executed shortly after the registration of the memorandum and articles of association, and was filed with the registrar of joint-stock companies. As between C. and the company, the shares for which he signed the memorandum were treated as being the fully paid-up shares which he took as part of the purchase-money, and he was debited in the books with £2,500 due on the shares, and credited with £5,000 as the price of the business. The company having gone into liquidation, it was sought to place C.'s name on the list of contributors for the 2,500 shares. The court thus deals with the question. Malins, V. C., says: "But, then, it is argued that, assuming that he is bound to pay for these shares, in point of fact he has done so. But to this it is replied, that all the cases where payment 'in meal or malt,' as it is called, has been held to be good payment, were decided with reference to companies to which the Act of 1867 did not apply, and that what might have been a good payment formerly may not be such now. I confess I do not so understand the Act. I quite see the stringency of the provisions with regard to the liability on shares subscribed for; but I do not understand that the Act of 1867 has made any alteration whatever with regard to what shall be good payment for shares which have been admittedly subscribed for. If a man subscribes, as in this case Mr. Coates did, for 2,500 shares, he thereby incurs the liability to pay some sum of money, say £2,500; and if in payment of this sum he hands over to the company goods which

they wanted for the purpose of their business, the validity of the transaction would not be affected by the Act of 1867; and I think no case has occurred in which it has been held that it would not be considered as payment; and I take it to be perfectly clear, from all the authorities cited, that payment may be made otherwise than by cash." And it was held that C. was entitled to treat the shares for which he subscribed the memorandum as the same shares as those for which he sold his business, and that the shares were paid for in cash within the meaning of the 25th section of the Act of 1867. See *Fothergill's Case*, L. R. 8 Ch. 270; *Spargo's Case*, L. R. 8 Ch. 407; *Evans's Case*, L. R. 2 Ch. 427; *Dent's Case*, L. R. 8 Ch. 768; *Maynard's Case*, L. R. 9 Ch. 60; *In re Baglan Hall Colliery Co.*, L. R. 5 Ch. 346; *Schroder's Case*, L. R. 11 Eq. 131; *Cleland's Case*, L. R. 14 Eq. 387; *Sichell's Case*, L. R. 3 Ch. 119; *Jones's Case*, L. R. 6 Ch. 48. In two cases very similar to Coates's case (*In re Denton Colliery Company*, *Ex parte Shaw*, L. R. 18 Eq. 16; and *In re New Zealand Kapanga Gold Mining Co.*, *Ex parte Thomas*, *Ibid.*, 17 n.), purchases of property by the company, payable in shares, were not treated as payments in cash; but shares were allowed to be issued after the registration of the contracts.

¹ Bigelow, J., in *Commonwealth v. Clark*, 80 Mass. 367, 371.

² In this case it was held, that an exchange of intoxicating liquor by a distiller, for grain from which to distil such liquor, is a sale within the meaning of the statutes of Massachusetts, 1855, c. 215, §§ 15, 17, whether the liquor was delivered at the time of receiving the grain or afterwards. By this statute it was enacted that if any person "shall directly or indirectly, on any pretence or by any device, sell, or in consideration of the purchase of any other property, give to any

Resulting from this view of the law it follows, *first*, that a sale of personal property is not less such a sale because a part

person any spirituous or intoxicating liquor," he shall be subject to the penalties provided in the act. The court here held, that if there can be any doubt on the question whether an exchange can be deemed a sale at common law, it is quite clear that no such doubt can exist under the provisions of this statute; that the intention of the legislature by the provision was manifestly to cover every case of the transfer of intoxicating liquors for value, in whatever form the consideration for such transfer might be given or paid. In *Howard v. Harris*, 90 Mass. 297, the same question came up again, where it was decided that no action lies on a warranty given upon the sale of a horse, the price of which was paid in spirituous liquors, which the purchaser could not legally sell. It was claimed that the only offences specified in the act were a sale and a gift, and that a sale is a transfer of property in consideration of a sum of money to be paid for it, and is different from an exchange or barter. But the court refused to sustain this distinction. Bigelow, C. J., in delivering the judgment of the court, said: "The fatal defect in the argument of the learned counsel for the plaintiff is, that it leaves wholly out of view the clear and manifest purpose of the legislature in enacting the provisions of the general statutes regulating the manufacture and prohibiting the traffic in spirituous and intoxicating liquors. If, in giving a construction to the provisions of this statute, we could confine ourselves to the strict technical definition of the word 'sell,' and interpret it only as meaning a transfer of property in consideration of a price paid therefor in money, we should have no difficulty in arriving at the conclusion for which the plaintiff contends. But we cannot do this unless we violate one of the cardinal rules of interpretation, and, instead of construing and applying the words of the statute to fulfil the intent of the legislature, entirely disregard and destroy that intent by a narrow and restricted interpretation of the words. . . . It is too obvious to admit of debate that the main purpose would fail of accomplishment if intoxicating liquors could be freely obtained without restraint by barter or exchange of other property therefor. The prohibition of sales, in the technical sense of that word, would be of little effect if the trade were left open to be carried on in other modes. Indeed, the construction for which the plaintiff contends would amount to a virtual repeal of the statute in its practical operation, as

a means of checking and restraining the evils which it was intended to prevent. In a general and popular sense, the sale of an article signifies the transfer of property from one person to another for a consideration of value, without reference to the particular mode in which the consideration is paid. It was in this sense that the legislature used the word, and not in the technical and narrow sense of a transfer for a price paid or *agreed* to be paid [this is an improvement on Benjamin's "*promised*"] in money. The legal distinction between a sale and an exchange is a merely artificial one. The rules of law are the same as applied to both transactions. Practically there is no difference between them. To make such a refinement the turning point of the interpretation of a statute, contrary to the plain intent of the legislature, would be a violation of all sound rules of construction." In accordance with the holding in these cases, it was held, in *Mason v. Lothrop*, 73 Mass. 354, that a delivery and receipt of intoxicating liquors, as payment for a service performed, is a sale, within the meaning of the statutes prohibiting the unlawful sale of such liquors. In accordance with the holding in these cases is the view expressed by Holroyd, J., in *Denn v. Diamond*, 4 B. & C. 243, 246, on the question of the meaning of "sale" in the English act, 48 Geo. 3, c. 19; where he says, "Upon the true construction of this and all similar statutes, I am of opinion that the transaction in question was not a sale of lands within the meaning of the legislature. A sale imports a *quid pro quo*, in some way or other, enuring to the benefit of the seller." There is a case in Indiana (*Stevenson v. The State*, 65 Ind. 409), where it is held that it is necessary, to prove the charge of unlawfully selling liquors, that the sale was made expressly or impliedly for cash, but might have been on credit. "*A sale on credit might be within the statute.*" The court itself, by its use of the word "sale," implies that there might be "a sale" which was not expressly or impliedly for cash, paid or to be paid. As far as this case can be said to decide that a transaction is not a sale, within the meaning of the statutes, because another consideration than money has been given for the liquor, we think the Massachusetts decisions are the sounder. See *infra*, where we consider this question further in connection with our discussion of the statute of frauds.

But even with reference to mere matters of pleading, the cases are not all in

or the whole of the price or consideration of such sale is in other specific goods, and, that, to such a sale the law relating to

harmony on the point. In *Clark v. Fairchild*, 22 Wend. 576, where personal property, *e. g.*, a boat, was sold under a special contract, containing specific provisions as to the time and mode of payment, and as to the vendor furnishing the purchaser with freight, it was held, that the property having been delivered to and used by the purchaser, and the plaintiff having performed all that he had stipulated to do, an action might be sustained on a general *inhabilitatus assumpsit* for the price of the property, and that it was not necessary to declare specially. So in *Way v. Wakefield*, 7 Vt. 223, it was held, that when goods are purchased, and the purchaser reserves to himself the right to pay in certain property, lumber, produce, etc., he may pay within the time without demand or designation; and if not paid, the creditor may sustain an action on "book or assumpsit" without demand. The court in so deciding thus dealt with the question: "It is next insisted that as there was a special or express contract in relation to the mode of payment for this harness, the plaintiff cannot recover on the general counts in his declaration. There has formerly been much controversy and contradictory decision on this subject; but as the law is now understood, the general counts are more extensively used than formerly, both in England and this country. It was formerly considered, that wherever there was an express or special promise, all implied assumpsits were merged and superseded, and could never after be resorted to. Such is not now the doctrine. Whenever there are goods sold, work done, or money passed, whatever stipulations may have been made about the price, or mode or time of payment, if the terms have transpired so that money has become due, the general count may be sustained. But if the contract be executory and subsisting, and the action be for the breach, for the recovery of damages, then the count must be special." This was quoted and approved by the court in *Clark v. Fairchild*, 22 Wend. 576, 584, where it is said, with reference to an objection on this point, which is "merely technical," — "What is considered by parties as equivalent to cash, in other words, as a mode of payment, is cash, and may be so called in pleading. So in *Brown v. Fry*, Selw. N. P. 653, the plaintiff averred he had bought of the defendant a horse for so much money. Proof that the plaintiff had given a mare and money, which the defendant had receipted for so much, held no variance. Graham, Baron, said the

defendant had taken the mare as money. See 2 Leigh's N. P. 1509. Again, wherein do the cases differ which say a payment in bank notes is a payment in money? 1 Selw. N. P. 104. They are put on the same ground, viz., being received as money. Whatever is agreed on as a medium of payment is money in substance and effect; and what rule of evidence is better established than that the substance of the issue only need be proved? It is the same thing where goods are sold and delivered, to be paid for in labor or goods at another day. The latter are agreed on to answer as cash; and if not paid, why not declare in the general form as on an executed special contract answerable in money? I venture to say that *Way v. Wakefield*, 7 Vt. 223, is at this day law at Westminster Hall; and it will be adopted, if English judges ever come to consider it in the same spirit as they considered other American decisions lately in *Beverley v. Lincoln*, 6 A. & E. 829." *Way v. Wakefield*, 7 Vt. 223, was approved and followed in *Wainwright v. Straw*, 15 Vt. 215, in the same court. There a stove was sold for a given sum, payable in cattle or grain at a future day. It was claimed that when goods have been sold and actually delivered under a special agreement, the general count could not be sustained, unless the contract was to pay in money, and the credit had expired. 1 Chit. Pl. 338; *Musson v. Price*, 4 East, 147; *Brooke v. White*, 1 New R. 330. And if the contract was to pay partly in money, and partly in goods, the general count cannot be sustained, if the term of credit has expired. 1 Chit. Pl. 338. *A fortiori*, if the contract was to pay wholly in goods, and in the alternative, the count must be special. *Penny v. Porter*, 2 East, 2, and note to p. 4; *Tate v. Wellings*, 3 T. R. 531. But the Vermont court held, that, after a breach of the contract, a recovery might be had upon a general count for goods sold and delivered. The court considered *Way v. Wakefield*, 7 Vt. 223, as being according to the current of English authorities, and must be regarded as settling the law in the State. The same doctrine was held in *Porter v. Talcott*, 1 Cow. 359, where we find it was claimed, as we have stated it in the text, that the case of *Anon.*, 3 Salk. 157, instead of being an authority that a sale and a barter are essentially different, is really to the effect that a sale and barter are the same thing. "*Permutatio vicini est emptio*," and "in exchanging both parties are buyers and sellers." In *Porter v. Talcott*, 1 Cow. 359, there was a sale or

sales of personal property applies. And, *second*, that as the sale of personal property, payable in other personal property, is a

exchange of one vessel for another, and \$6,500 to be paid in notes. The notes were given, but were not paid. Woodworth, J., in his judgment, says: "Everything relating to the exchange having been executed, I perceive no legal objection against declaring generally for a sale, as to the residue. Such form of declaring is approved in 2 Chitty Pl. 85. The distinction taken is this, that where an agreement is executory, *indebitatus assumpsit* will not lie until the terms of it are performed; but when the contract is executed on the part of the plaintiff, he may declare generally. This doctrine is fully recognized in *Kelley v. Foster*, 2 Binn. 4, and is supported by the cases of *Gordon v. Martin*, Fitzg. 302; *Alcorn v. Westbrook*, 1 Wils. 117, and in *Buller's N. P.* 139." The case of *Brooke v. White*, 4 B. & P. N. R. 330, was also relied on. There, where goods were sold to be paid for by a bill, it was held, that no action could be maintained for goods sold until the expiration of the period at which the bill would become due. If the bill be not given, the plaintiff may bring an action on the special contract; but after the expiration of the period of credit, *indebitatus assumpsit* will lie.

On the other hand it was held in *Slayton v. McDonald*, 73 Me. 50, 52, that where goods are sold to be paid for wholly or in part by other goods, or by the defendant's labor, or otherwise than in money, the action must be by special count on the agreement, and for a breach of it, and not for goods sold and delivered; citing 1 Ch. Pl. 357 (16th ed.); *Mitchell v. Gill*, 12 N. H. 390; *Holden Steam Mill v. Westervelt*, 67 Me. 446, 450. This last case does not sustain the proposition for which it is cited. It simply amounts to the clear proposition that where there is a written contract as to price the terms of the contract govern, even though the action be on the common counts in *indebitatus assumpsit*. *Mitchell v. Gill*, 12 N. H. 390, does, however, hold, where goods were lent by the plaintiff to the defendant, other goods to be returned in lieu of them, and these were not returned, that *assumpsit* for goods sold and delivered would not lie. We think the decision is a sound one. The distinction which we would make is this: Where goods are sold at a price, to be paid for in other goods ("in kind"); then, as these goods are treated by the parties as a specific sum of money, if they are not delivered, *indebitatus assumpsit* will lie as for money, or as though the agreement were that a bill

or promissory note were to be given for the goods sold. This distinction is noticed in the case from New Hampshire (another of the States in which, we would remark, *en passant*, so much sound law is to be found in their decisions). Thus *Gilchrist, J.*, in delivering the judgment of the court, says: "It is true that a general count may sometimes be maintained, where the goods were to be paid for by other goods. Of this character is the case of *Forsyth v. Jervis*, 1 Stark. 437. The plaintiff sold the defendant a gun for forty-five guineas, and agreed to take of the defendant a gun, in part payment, at the price of thirty guineas. Lord Ellenborough held, that as here was a sale of goods, to be paid for in part by other goods at a stipulated price, upon the refusal of the purchaser to pay for them in that mode, a contract resulted to pay for them in money, and that the forty-five guineas might be recovered under a count for goods sold. This case has every characteristic of a sale. The plaintiff sold the gun for a specified price; the defendant agreed to give, in part payment, another gun for a stipulated price, and was bound either to deliver the gun or pay its price. As he refused to deliver the gun, a decision that he was indebted to the plaintiff for its price accords with the general tone of the authorities." *Mitchell v. Gill*, 12 N. H. 390, 394. The same distinction is taken in *Loomis v. Wainwright*, 21 Vt. 520, 528, where it was contended that a transaction was an exchange and not a sale. The court said: "In the absence of express evidence that an exchange only was intended, a sale might justly be inferred from the fact that the trade was governed by a fixed price for the horse; an agreed price being essential to a proper bargain or sale, but altogether needless in the case of a mere exchange. There the commodities exchanged, whatever be their supposed value, are mutually received as equivalents for each other. And for the price of such property sold and delivered, it cannot now be questioned that the action of *assumpsit* may be supported." See to the same effect, *Kingsland v. Adams*, 10 Vt. 201. See also *Gunter v. Leekey*, 30 Ala. 591, 596; *Fuller v. Duren*, 36 Ala. 73; *Herrick v. Carter*, 56 Barb. 41; *Pinney v. Gleason*, 5 Wend. 393; *Rockwell v. Rockwell*, 4 Hill, 164; *Stevens v. Low*, 2 Hill, 132; *Brooks v. Hubbell*, 3 Conn. 58. We think the holding in *Slayton v. McDonald*, 73 Me. 50, as far as it contravenes this position, cannot be sustained on principle or sound authority. The rule being

double sale, in which each of the parties is a seller and buyer, the law affecting seller and buyer applies to each of the parties to the sale, as it may affect him, respectively, as such seller or buyer. In the large number of sales made in the agricultural portions of this country, where goods are sold and agricultural produce is received as payment, the effect in every respect in law, outside of such technicalities as arise in exceptional cases, is substantially the same as if the goods were sold for money at an agreed price, and the agricultural produce were also sold for money at an agreed price. The fact that in such cases the payment and repayment of the actual money is dispensed with, we should say, on what we think is sound principle, sustained by the highest authority, renders the transactions in effect no less sales than if, in the cases named, the medium of exchange, money, were employed in effecting the exchange, or its equivalent, the double sale, of the goods on the one hand and the agricultural produce on the other.¹

so, where a *price* has been fixed by the parties, so as to put it on a money basis (for which only, in assumption, a judgment can be rendered), it is difficult to see, on principle, why, where a price has not been fixed, a *quantum valebat* count in assumption would not be sustained; in which case the measure of damages would not be, as usual, the value of the goods sold, but that of those to be delivered. On this view the reasoning and holding in *Way v. Wakefield*, 7 Vt. 223, and in *Clark v. Fairchild*, 22 Wend. 576, would accord with a succession of well-decided cases. Where, as has been intimated, the contract remains executory, the declaration would have to be on the special contract, and the measure of damages would be the loss caused by the unexecuted contract. *Robertson v. Lynch*, 18 Johns. 451; *Raymond v. Bearnard*, 12 Johns. 274; *Jennings v. Camp*, 13 Johns. 94; *Clark v. Smith*, 14 Johns. 326; *Dubois v. Del. & Hudson Canal Co.*, 4 Wend. 289; *Talver v. West*, Holt, 178; *Leigh v. Patterson*, 5 Taunt. 540; *Gainsford v. Carroll*, 2 B. & C. 624; *Shaw v. Nudd*, 8 Pick. 9. See also *Brooks v. Hubbard*, 3 Conn. 58; *Jones v. Gilbert*, 13 Conn. 516; *Bush v. Canfield*, 2 Conn. 435; *Wells v. Abernethy*, 5 Conn. 222; *McAlpin v. Lee*, 12 Conn. 129; *Gregory v. McDowell*, 8 Wend. 435; *Way v. Dox*, 9 Wend. 129; *West v. Beach*, 3 Cow. 82; *Clark v. Pinney*, 7 Cow. 681; *Pinney v. Gleason*, 5 Wend. 393; *Meason v. Phillips*, Addis. 346; *Edgar v. Bois*, 11 S. & R. 445, where goods purchased were made payable in other goods at a specified price, and it was held where the payment was not made, the measure of damages was

the price specified, and not the value of the goods which was to be paid, on the day of payment.

¹ The strictly technical distinction between a sale and a barter or exchange is very seldom regarded. Thus it has been repeatedly held, in terms, where the transaction is unquestionably one of barter or exchange of goods for other goods, — in many of such cases not even a price, on the basis of an exact valuation of the goods exchanged, being fixed or stated, — that the transaction is a sale, when, technically, it is only a barter or exchange. Thus, in *Powder Co. v. Burkhardt*, 97 U. S. 110, 116, agreeing with such cases as *Pierce v. Schenck*, 3 Hill, 28; *Norton v. Woodruff*, 2 N. Y. 153; *Mallery v. Willis*, 4 N. Y. 76; and *Foster v. Pettibone*, 7 N. Y. 433, as a correct exposition of the law, it was held that where logs are delivered to be sawed into boards, or leather to be made into shoes, rags into paper, grapes into wine, wheat into flour, if the product of the identical articles is to be returned to the original owner in a new form, it is not a sale, and the title never vests in the manufacturer. But if, on the other hand, the manufacturer is not bound to return the same wheat or flour or paper, but may deliver any other of equal value, it is a sale or loan, and the title to the thing delivered vests in the manufacturer. See *South Australian Ins. Co. v. Randall*, L. R. 3 P. C. 101; *Barker v. Roberts*, 8 Me. 101; *Smith v. Jones*, 7 Cowen, 328; *Hyde v. Cookson*, 21 Barb. 92; *King v. Humphreys*, 10 Pa. St. 217; *Stevens v. Briggs*, 5 Pick. 177; *Denny v. Cabot*, 6 Mete. 82; *Judson v. Adams*, 8

Among the very many sales made in modern times where money is not paid, is one of enormous extent, amounting annually

Cush. 556; Schenck v. Saunders, 13 Gray, 37; Mansfield v. Converse, 8 Allen, 182; Buffum v. Merry, 3 Mason, 478. In Powder Co. v. Burkhardt, 97 U. S. 110, the fact that the goods delivered to the plaintiff were charged to the party receiving them, and passed into his actual possession and under his absolute control, though they might be used in the manufacture of goods intended to be supplied to the plaintiffs, was held to amount to a sale of the goods delivered; differing from the single mechanical transaction of delivering a specific set of logs to be turned into boards, or a specific lot of wheat into flour. So, in Rabilly v. Wilson, 3 Dill. 420, it was held that where goods are delivered to one for his own use or consumption, and where he is not bound to return the identical article in its original or altered shape, but property of the same kind and value, it is "a sale;" the title passes, and the receiver becomes a debtor for the stipulated return. This was a case where wheat was delivered to an elevator under a custom that the wheat when brought in was either purchased and paid for at the time by the proprietors of the elevator, or received by them and receipts issued therefor; the usage or custom being, that when the wheat was not purchased and paid for, a receipt was given; the holder selected his own time for presenting the receipt, and demanded either the market price of the grain on that day, or the quantity and quality of the grain called for in the receipt. The grain so received in the elevator was mixed with other grain, and was shipped and disposed of by the proprietors of the elevator at their election. The transaction was held to amount to "a sale," the title to the grain on its receipt at the elevator passing to the proprietors of the elevator. In Carlisle v. Wallace, 12 Ind. 252, Wallace placed in Carlisle's mill 400 bushels of wheat, upon terms that the latter was at liberty to mix it with his own, convert it into flour when he pleased, sell the flour, and appropriate the proceeds to his own use; and whenever Wallace saw fit he had a right to exact, from Carlisle the same quantity, in kind, of wheat, or the amount of flour so much wheat would make, or the then price of wheat per bushel in money. It was held that, as neither the identical wheat nor the flour made from it was to be returned, and the wheat was to be mixed with that of Carlisle and used by him when he pleased, the contract must be regarded as one of sale. Smith v. Clarke, 21 Wend. 84; Hurd v. West, 7

Cowen, 752; Baker v. Roberts, 8 Greenl. 101; Ewing v. French, 1 Blackf. 354; Wilson v. Cooper, 10 Iowa, 565; Johnston v. Browne, 37 Iowa, 200; Lyon v. Lenon, 106 Ind. 567; Lonergan v. Stewart, 55 Ill. 44; Grier v. Stout, 2 Ill. App. 602; Richardson v. Olmstead, 74 Ill. 213; Marsh v. Wickham, 14 Johns. 167, are in accord. So, in Bastress v. Chickering, 18 Ill. App. 198, it was laid down that where there is no obligation to restore the specific thing delivered, and the receiver is at liberty to return another thing of equal value, or the money value, he becomes a debtor to make a return, and the title to the property is changed; "it is a sale." But where goods are supplied to an agent for sale, who is to return to his principal cash, lumber, country produce, or any other articles of trade received for the goods, this does not, of course, constitute a sale of goods by the principal to his agent. Blood v. Palmer, 2 Mc. 414. In Barnes v. McCrea, 75 Iowa, 267, where the plaintiffs delivered grain to H. with knowledge that it was being mixed with other grain, which was being shipped and sold by him, and that he had the election either to pay for the grain in money or to deliver the plaintiffs an equal quantity of grain when they desired to close the transaction, it was held that the transaction, as between the plaintiffs and H.'s mortgagees, amounted to a sale. And see also Butterfield v. Lathrop, 71 Pa. St. 226; Fishback v. Van Dusen, 33 Minn. 111, 123. In this latter case banks took receipts from the plaintiff's intestate, Cole, for quantities of grain, not in fact received from the banks, but intended as a security for advances. The court, in holding that this did not pass the property to the banks in any specific grain, said: "The banks must have understood that Cole would, and tacitly assented that he might, use and grind up this wheat, and ship and sell the flour. The most that can be claimed for the transaction is, that he was on demand to deliver to the banks out of his stock an amount of wheat corresponding in quantity and grade to that named in the receipts. Even if they had actually deposited their own wheat with Cole under such circumstances, it hardly needs the citation of authorities at this day to the proposition that it would have, in the absence of a statute, constituted a sale."

In Reed v. Abbey, 2 N. Y. Sup. Ct. 380, the plaintiff delivered to H., in July, 1869, a quantity of sheep and lambs, to be returned on Sept. 1, 1871, in considera-

to millions of dollars where railway companies buy iron and other railway plant, for which they pay stock or bonds at an agreed

tion of one pound of wool *per head* annually, "said sheep to be returned as good — in as good condition *and age* — as when taken." It was held that this was a sale of the sheep and lambs to H., and that H.'s vendee was not liable in trover for their conversion. The same construction was placed on the contract in *Carpenter v. Griffin*, 9 Paige, 310, where the contract was that cows and sheep "*of equal age and quality*" were to be returned at the end of the term. *Hurd v. West*, 7 Cow. 752, is to the same effect. In *Johnson v. McLane*, 7 Blackf. (Ind.), it was held that where two persons exchanged horses, with the privilege to one of the parties to return, within a given time, the horse received by him in exchange, and such party failed within the time to return the horse so received, the contract became absolute. The party claimed that he had been defrauded; but the court, applying to the case the principles governing sales, and treating the exchange as a sale, said: "There are many cases certainly in which it has been held that a vendee acquired no property in goods obtained under pretence of a purchase brought about by his own fraud. But we know of no decision in which the vendor has been viewed as not having parted with the ownership of goods while he willingly held in his own hands a valuable consideration received for them. On the contrary, we conceive the law to be that such a vendor is not at liberty to treat the sale as a nullity on account of the fraud of the vendee." *Burton v. Stewart*, 3 Wend. 236." See *Weston v. Downes*, 1 Doug. 23; *Power v. Wells*, Cowp. 818; *Payne v. Whale*, 7 East, 274; *Emanuel v. Dane*, 3 Campb. 299; *Street v. Blay*, 2 B. & Ad. 456; *Gompertz v. Denton*, 1 Cr. & M. 207.

The defendant in *Cain v. Weston*, 26 Wis. 100, made a contract with the plaintiff to sell the plaintiff "all the lumber he should manufacture or have manufactured" at W. in 1866, within certain maximum and minimum limits named. The maximum quantity not having been delivered, in an action for the non-delivery of a quantity of lumber alleged to come within the contract, the defendant claimed that it was not manufactured for him. The facts showed that the defendant, for the purpose of avoiding delivery of the lumber to the plaintiff, nominally sold the logs to millmen at W., he to take his pay in the lumber at a specified price, which was much lower than the prevailing price at W. In the contract of "sale," it was provided that the lumber was to be sawed as the defendant

might direct, as far as the logs would permit. The court held that the transaction was a mere shift or device to avoid the obligation of his contract with the plaintiff, by giving a new name to the manufacture of lumber for him; and that, although the logs were nominally transferred to the millmen as though it were a sale, yet it was still a contract for the manufacture of lumber, instead of a contract of sale, so far as there is a distinction between the two. The court also held as another test, that the transaction between the defendant and the millmen was not a contract of sale within the statute of frauds, but an agreement to manufacture the lumber. See *Hight v. Ripley*, 19 Me. 137; *Abbot v. Gilchrist*, 38 Me. 260; *Edwards v. Railway Co.*, 48 Me. 379; *Atwater v. Hough*, 29 Conn. 508; *Gardner v. Joy*, 9 Mete. 177; *Lamb v. Crafts*, 12 Mete. 353.

Under a contract in writing, A. agreed with the defendant in *Moore v. Holland*, 39 Me. 307, for a mow of hay, to be paid in manure. The hay was to be defendant's until the manure was made from the hay, the defendant to have the manure for the hay. The hay was put at the price of \$6, to be paid in manure, which was to be the defendant's as it was made. A. having sold the manure to the plaintiff, in an action of trespass against the defendant for removing the manure, the court held that A. did not become the purchaser of the hay under an agreement to pay for it in manure; but that the effect of the agreement was that the hay was to be converted into manure for the defendant, and that, though the product was changed in form from the original article, the title to the property had not changed, but remained in the defendant, as the original owner. *Collins v. Foster*, 3 T. R. 316; *Pierce v. Schenck*, 3 Hill, 28; *Smith v. Clark*, 21 Wend. 83; *Buffum v. Merry*, 3 Mason, 478; *Barker v. Roberts*, 8 Me. 101.

In *Nance v. Metcalf*, 19 Mo. App. 183, 188, the court said that while, if in the transaction the consideration be other than money, as the giving of other goods in exchange for the thing bought, it would constitute a technical barter, the legal effect is generally the same as a sale. And in *Cunningham v. Ashbrook*, 20 Mo. 556, "The only things essential to a valid sale of personal property at common law, were a proper subject, *a price*, and the consent of the contracting parties, and when these concurred the sale was complete, and the title passed without anything more." In *Jenkins v. Eichelberger*, 4 Watts, 121, the plaintiff

price; the transactions amounting to a double sale, — that of the railway iron, etc., on the one hand, and shares of stock, or bonds,

delivered to O. a quantity of hides, under a contract that the hides were to be charged at cost and five *per cent* commission, and interest after six months, and when tanned to be returned to the plaintiff, and by him sold, and out of the proceeds of sale the plaintiff to deduct the price agreed upon for the hides and five *per cent* commission and guarantee on the sale, and to pay the balance to O. It was held that this was in substance a sale of the hides to O., and as such, that the property in the hides had passed to O., and were subject to be levied on under executions at the suit of his creditors. The case was distinguished from that of materials being worked up for the owner, where the artisan has a fixed price, or a *quantum meruit*, for his labor; while here there was a fixed price for the goods furnished, and a commission was to be charged him on the sale of the leather when tanned.

Some of the cases make the fixing of a definite price as the distinction between a sale and a barter or exchange. Thus, in *Picard v. McCormick*, 11 Mich. 68, 77, the circuit judge charged that when one piece of property is given for another, without regard to value, that is an exchange; but where one piece of property is sold at a price, and other property is by the same contract received in part payment at a price, and the balance in money, this is a sale and not an exchange. And the supreme court of Michigan, in sustaining this ruling, said: "We think the distinction between a sale and an exchange of property was properly taken. If property is taken at a fixed money price, the transfer amounts to a sale whether the price is paid in cash or in goods. The term *sale* is comprehensive, and embraces all transfers for a price named, whether confined to that class or not." So, in *Loomis v. Wainwright*, 21 Vt. 520, on the question whether *indebitatus assumpsit*, or "book account" would lie, the Vermont Supreme Court made the same distinction. The court there said (at p. 527, *et seq.*); "It remains to be determined whether the action of book account can be sustained upon the facts reported. As one ground of objection, it is claimed, that there was an exchange of the horse for the three notes and the eighty-six cents, rather than a sale in the correct sense of that term. But the auditor expressly finds a sale, and none of the facts are inconsistent with that finding. Indeed, in the absence of express evidence that an exchange only was intended, a sale might justly be inferred from the

fact, that the trade was governed by a fixed price for the horse; an agreed price being essential to a proper bargain or sale, but altogether needless in the case of a mere exchange. There the commodities exchanged, whatever be their supposed value, are mutually received as equivalents for each other. It must be taken, then, that the horse was sold to the defendant at the price of fifty dollars. And for the price of such property sold and delivered, it cannot be now questioned that the action on book account may generally be supported. *Kingsland v. Adams*, 10 Vt. 201." All of which, we think, goes to show that there is a mere technical, and no substantial difference between a sale and an exchange or barter.

The same principle exactly, as we point out *supra*, involved in these cases, also governs that class of cases in which it is held, that where a sale is made, as in *Mussen v. Price*, 4 East, 147, of goods for a bill of exchange to be subsequently given, the remedy is on the special contract for not delivering the bill, and not in *assumpsit*; at least until after the expiration of the time for which the bill was to run. And see *Campbell v. Sewell*, 1 Ch. 609; *Hoskyns v. Duperoy*, 9 East, 498, 501. But see *Nicksen v. Jessom*, 2 Stark. 227; *Hichling v. Hardy*, 7 Taunt. 312. And yet it will scarcely be contended, even by those who allege that there cannot be a sale except for a price in money, that an agreement to transfer the absolute property in goods for a bill of exchange is not a sale of the goods. See also *Milford v. Mayor*, Doug. 54; *Ballingalls v. Gloster*, 3 East, 481; *Miller v. Shawe*, cited 4 East, 149; *Packford v. Maxwell*, 6 T. R. 52; *Owenson v. Morse*, 7 T. R. 64; *Bartholomew v. Markwick*, 15 C. B. (N. s.) 711; *Lee v. Risdon*, 7 Taunt. 188; *Paul v. Dod*, 2 C. B. 800; *Chisman v. Count*, 2 M. & G. 307; *Dutton v. Solomonson*, 3 B. & P. 582; *Swancott v. Westgarth*, 4 East, 75; *Holt v. Odber*, 11 East, 118; *Brooke v. White*, 1 B. & P. N. R. 330; *Helps v. Winterbottom*, 2 B. & Ad. 431; *Hochster v. De La Tour*, 2 El. & B. 678; *Avery v. Bowden*, 5 El. & B. 714; 6 El. & B. 953; *Reid v. Hoskins*, 5 El. & B. 729; 6 El. & B. 953.

The case of *Mitchell v. Gill*, 12 N. H. 390, still further shows the analogy existing between such cases as *Mussen v. Price*, 4 East, 147, and the other cases last above cited, and those which affect to hold that a sale does not, in effect, substantially include a barter or exchange. In *Mitchell v. Gill*, 12 N. H. 390, the plaintiff permitted the defendant to take

representing money, on the other. In the same way goods are sold at an agreed price, and a bill of exchange, although the repre-

from his land a quantity of wood, and the defendant agreed to deliver as much wood to the plaintiff, of a similar quantity, whenever the plaintiff should desire it. The plaintiff afterwards demanded the wood, but the defendant neglected to deliver it. The court held, in effect, on the same principle as that which governs *Mussen v. Price*, 4 East, 147, and the other cases, that assumpsit for the wood sold and delivered would not lie, but that the declaration should have been for a breach of the agreement to deliver the wood. The distinction as to the remedy is equally applicable to both classes of cases. See further, *Bank of Columbia v. Patterson's Exrs.*, 7 Cranch, 303; *Williams v. Shannon*, 12 Wend. 109; *Jewell v. Schroepfel*, 4 Cowen, 564; *Felton v. Dickenson*, 10 Mass. 287; *Sheldon v. Cox*, 3 B. & C. 420; *Harris v. Fowle*, cited in *Barbe v. Parker*, 1 H. Bl. 287; *Briggs's Case*, Palmer, 364; *Clark v. Fairfield*, 22 Wend. 576; *Way v. Wakefield*, 7 Vt. 223, 228; *Forsyth v. Jervis*, 1 Stark. 437; *Ladue v. Seymour*, 24 Wend. 62; *Leigh v. Patterson*, 5 Taunt. 540; *Gainsford v. Carroll*, 2 B. & C. 624; *Shaw v. Nudd*, 8 Pick. 9; *Gunter v. Leckey*, 30 Ala. 591; *Stewart v. Conner*, 9 Ala. 803; *Cameron v. Clarke*, 11 Ala. 259; *Pickard v. Banks*, 11 East, 20; *Fuller v. Warren*, 36 Ala. 73.

In *Keiler v. Tutt*, 31 Miss. 301, 306, where there was a transfer of goods, neither for cash nor for other goods, but for the payment of a pre-existing indebtedness in promissory notes; the court, in holding that the transfer of the goods constituted a sale and not an assignment for the benefit of creditors, said: "The characteristics which distinguish a sale from a mere assignment are, that in the former there is a fixed price and no trust, in the latter there is a mere trust, and of course no fixed value given to the property. Here the price was determined; the goods were taken by the creditor at a fixed price. . . . That part of the bill of sale which required the purchaser, in the event of the value of the goods and other property conveyed exceeding the amount of indebtedness, to pay over the balance to another creditor, and the remainder, if any, to the debtor, is relied on as a circumstance to show a trust, and thus convert the transaction into an assignment. But it was a mere mode of payment, and really nothing more than an assumption in a certain contingency of one of the debtor's liabilities, and constituted a part of the price. There was no interest in the goods or their proceeds reserved to the grantor. The title

to the goods passed absolutely to the vendee, at an agreed price, the full aggregate amount of which was as yet undetermined; and as the notes due the vendee might not absorb the entire price, an arrangement was made for the payment of whatever sum might exceed the amount of the indebtedness. It is the case of a man's buying property, and paying for it partly in cash, and partly by assuming a debt due by his vendor to another. The latter circumstance does not make the transaction a trust, or deprive it of the essential features of a sale." *Wittowsky v. Wasson*, 71 N. Car. 451, 456, is, in principle, an analogous case to *Keiler v. Tutt*, 31 Miss. 301. There the plaintiffs, being creditors of W. & S., sued out an attachment against them, and sent a deputy sheriff, and another person as their agent, to the store of W. & S. The attachment was not levied; but the agent proposed to take certain goods from W. & S., the ownership of which was in question in the suit, or as much of them as might be required for the purpose, in payment of the plaintiffs' debt; but the price was not agreed upon. Thereupon the agent and S. agreed to box up all the goods without an inventory, and S. was to take them to the town where the plaintiffs did business, and there agree on a price with them; and if they agreed, the debt of the plaintiffs was first to be paid out of the price, and the remainder paid over to S. for the benefit of other creditors. Before the goods reached the plaintiffs they were seized by the defendant under executions against W. & S. In an action for the recovery of the goods by the plaintiffs against the sheriff, the court held that as the parties had not agreed on the "price," there was no evidence of an executed sale, — nothing from which it could be reasonably or fairly inferred that it was the intent of the parties to the agreement that the absolute property in the goods should be transferred to the plaintiffs. Any agreed equivalent for the goods would here, clearly, have been the price; the *quid pro quo* which, according to Noy, is necessary to constitute the transaction a sale.

By an act of Congress of June 30, 1864, it was enacted that a duty of \$2.00 per ton on pig-iron should be collected from the producer or manufacturer thereof. By section 97, it was enacted that parties who had made contracts prior to the passage of the act were authorized "to add to the price thereof so much money as will be equivalent to the duty so subsequently imposed and not previously paid by the

sentative of money, is taken at an agreed rate of premium or discount in payment. The bill of exchange is here treated as a

vendee, and shall be entitled by virtue hereof to be paid, and to sue for and recover the same accordingly." There were also provisions in the same section that where the United States was "the purchaser," the articles so "purchased" were to be received as far as applicable in discharge of such duties. A question arose under this act in the *Hudson Iron Co. v. Alger*, 54 N. Y., 173, 176. In this case the defendant agreed to sell and deliver iron ore to the plaintiffs, to be paid for in pig-iron, at the rate of one ton of pig-iron for every eight tons of ore delivered. The plaintiffs paid the duty on the pig-iron under the act, and sought to recover it from the defendant. The Supreme Court of New York held that as no moneyed price was agreed upon for the pig-iron, there was no price to which the amount of the duty could be added, and hence that it could not be collected. But this decision was very properly reversed by the New York Commission of Appeals. Earl, C., in delivering the judgment, said: "Suppose a moneyed price has been paid for a manufactured article coming within sections 94 and 97, it would be quite absurd to claim that an action for the amount of the duty could not be maintained by the vendor, distinctly, to recover it. While the statute says that the amount of the duty may be added to the price, it does not mean that the process of addition must take place, and that the vendor shall fail to recover the duty unless he at the same time has a cause of action for the whole or a portion of the price. The object of the statute is to cast the burden of the duty upon the vendee, by adding it to the compensation which he is to pay. It is said further, that the words 'price' and 'vendee' used in the statute [so, as we have pointed out above, the words "purchaser" and articles so "purchased" are used in the section] imply a sale for money. It is true that 'price' generally means the sum of money which an article is sold for; but this is simply because property is generally sold for money; not because the word has necessarily such a restricted meaning. Among writers on political economy who use terms with philosophical accuracy, the word 'price' is not always or even generally used as denoting the moneyed equivalent of property sold. They generally treat and regard price as the *equivalent or compensation, in whatever form received*, for property sold. The Latin word from which price is derived sometimes means 'reward,' 'value,' 'estimation,' 'equivalent,' and Webster

shows that it is sometimes used in the same sense; and I cannot doubt that it was used in this statute in the sense of 'value,' or 'compensation.' There is just as much reason for applying the rule of the statute to this case as to one where the sale was for a moneyed price; and it is right to assume that Congress meant to apply the rule to every case wholly within the reason of the rule, unless the language used clearly forbids it. . . . It is also claimed that the word 'vendee,' used in the statute, [and see the words "purchaser," "articles purchased," as well] shows that a sale and not an exchange of commodities was contemplated. Suppose one sells a farm for 3,000 bushels of wheat, may not one be called, without an abuse of terms, the vendor, and the other, the vendee, and the wheat the price of the farm? In this very contract between these parties, the defendant agrees to sell the iron ore, and the plaintiffs to pay therefor in pig-iron. And so the plaintiffs may be said to have agreed to sell pig-iron and take their pay in iron ore. In 3 Salk, 157, it is said 'that in exchanging property both parties are buyers and sellers.' And yet, as we have pointed out, the case in Salkeld is that which is usually incorrectly cited for the position that a sale essentially differs from a barter or exchange, and only exists where the consideration is actually money.

In the Madison Avenue Baptist Church v. The Oliver Street Baptist Church, 46 N. Y. 131, the question turned upon the fact whether, on a union of the members of the two churches, an order of the Supreme Court of New York for the conveyance of the property of the one corporation to the other, was a sale; the Supreme Court having power only to make such an order in case the transaction was a sale; the language of the statute being that it should be lawful for the court, if it should deem proper, on the application of any religious corporation, "to make an order for the sale of any real estate belonging to such corporation." The New York Court of Appeals, reversing the decision of the Superior Court, held that there was no sale. The Court of Appeals adopted the definitions of Blackstone (2 Com. 446) and Kent (2 Com. 468); the former, that a sale is a transmutation of property from one man to another in consideration of some price or recompense in value; and the latter, that a sale is a contract for the transfer of property from one person to another for a valuable consideration; among the requisites to its validity

commodity. There is then the double sale, the buying and selling of the goods on the one hand, and of the bill of exchange on the

being a price (used here in the sense of a *quid pro quo*, as in the definition in Noy's *Maxims*) paid or to be paid. The court said: "The term as used in the statute should be construed as defined by Blackstone and Kent. This would embrace every transfer for a valuable consideration, whether paid in cash or other property. In case payable in the latter, the property to be received should be specified in the petition [to the court], so as to enable the court to determine whether the proposed contract is judicious on the part of the corporation. Tested by this construction, the arrangement set out in the petition was in no sense a sale of the property by the plaintiff to the defendant. There was no price whatever to be paid therefor. The plaintiff as a corporation was to derive no possible benefit as a consideration for the conveyance. True, the members of the plaintiff's church were to be received into and become members of the defendant's church, and the plaintiff's corporators were to become corporators of the defendant. This may be regarded as a benefit conferred upon these classes as individuals, but can in no sense be so to the plaintiff, regarded as a corporation. Indeed, the arrangement could only be made effectual by the dissolution of the plaintiff, and this result it was the manifest purpose of the arrangement to effect." And see *Wheaton v. Gates*, 18 N. Y. 395; *Robertson v. Bullions*, 1 Kern. 243; *Wyatt v. Benson*, 23 Barb. 327; *Stow v. Wise*, 7 Conn. 19; *Wiggin v. Free Will Baptist Society*, 8 Met. 401.

In the New Hampshire case of *Mitchell v. Gill*, 12 N. H. 390, 395 (*supra*), where it was held that *indebitatus assumpsit* would not lie as for goods sold and delivered, where wood had been delivered by the plaintiff to the defendant, for which an equal quantity of wood of the same quality was to be subsequently delivered by the defendant, but that the action must be on the special contract, the court said: "In general, where goods are sold to be paid for wholly or in part by other goods, or by the defendant's labor, or otherwise than in money, the action must be on the agreement, and for a breach of it, and not for goods sold and delivered. . . . If where goods are sold to be paid for otherwise than in money, and the vendee neglects to perform, an action must be brought on the special agreement, there is a still stronger reason for adopting the same form of the remedy where the goods are not sold but exchanged. In the former case, the goods are at least sold; and so

far the evidence supports the declaration. But the latter case has no feature in common with a contract necessary to support a count for goods sold and delivered." We very much doubt the soundness of this fine distinction. Goods being "sold to be paid otherwise than in money," comes within what is technically called an exchange or barter. The distinction which seems to be implied here is that a money price for the goods "sold" "to be paid otherwise than in money," is necessary to constitute the transaction a sale, and without it the transaction is an exchange. But if *indebitatus assumpsit* on the common count for goods sold and delivered would lie in the former case, on analogy, in the latter case, a *quantum valebat* count in *indebitatus assumpsit* would seem as well to lie. See *infra*, p. 30, and *Ibid.*, n. 4; and *supra*, n. 2 to p. 10, at p. 14.

A somewhat similar distinction was taken by the Supreme Court of the United States in the Five Per Cent Cases, 110 U. S. 471; where, under acts of Congress, the question arose, where it was provided that different States should receive five per cent of the net proceeds of the lands within such State, which should be sold by Congress, whether, where the lands were not sold by the United States for cash, but were "disposed of by the United States in satisfaction of military land warrants," the particular State was entitled to the percentage on the lands so disposed of. The court held that the acts themselves made a distinction between the two cases; excluding the percentage from the lands given in satisfaction of the warrants. While the decision on this ground seems correct, the distinction taken by the court (at p. 478) we think is open to question. Gray, J., in delivering the judgment of the court, says: "A sale in the ordinary sense of the word is a transfer of property for a fixed price in money or its equivalent. When property or money is transferred or paid as a compensation for service, the property or money may be said to be the price of the service; but it can hardly be said that the service is the price of the property or money, or that the property or money is sold to the person performing the service." We think this is scarcely a fair way of stating the case. If "money" is paid for services, there is no question of "sale" in the transaction. It is simply money paid for work and labor. But if property is sold and is to be paid for by goods to be delivered or by labor to be done, if "the property may be said to be the price" of the goods to be

other. So, too, it is common that laborers buy goods from their employers, and pay for them by their past or subsequent labor.

delivered or the labor to be done ; equally so may the goods to be delivered be said to be the price or consideration for the sale of "the property ;" and there would then be the sale of the property, as the price or consideration for the goods ; and in that case, equally so (as in *Anon.*, 3 Salk. 157, and in the *Hudson Iron Co. v. Alger*, 54 N. Y. 173) the sale of the goods as the price or consideration for "the property." So, too, if "the property" is the price or consideration for the goods, and may be said "to be sold to the person" supplying the goods ; with equal correctness it may be said "that the property . . . is sold to the person performing the service." If, therefore, the case rested on the position, as they have put it, that, while property may be "a price" for labor, thus treating a transfer of goods or "property" for goods or property as a sale, that it was any the less a sale ; because the property or goods were to be paid for by labor, we should very much question the soundness of the case. The case assumes that property may be the price of labor ; equally so, then, may it be the price of other property ; and if on the sale and purchase of property, it may be paid for by other property, and be a sale ; equally so, without any question, and without contravening any rule of law, may it be paid for by labor, or by any other *quid pro quo*, (*Noy's Maxims*, c. 42 ; 2 Blk. Com., 446 ; 2 Kent's Com. 468), and be a sale. If, therefore, the case simply rested on the question of the definition of a sale at common law, as to whether a sale of lands for cash and a "disposition of lands in satisfaction of military land warrants," were not equally included in a sale, where "property" is conceded to be "the price" of other property, we should think the case was wrongly decided.

Under a New Brunswick statute (4 Vic. c. 4.), which provided that promissory notes, payable otherwise than in money, should be deemed to import that they were given for a valuable consideration, the same as promissory notes for the payment of money ; it was held, irrespective of the question whether special damages might not have been recovered in an action for the non-delivery of the specific goods, that after the time for the delivery of the articles had elapsed, the contract was turned into a money debt. *Steeves v. Hopper*, 1 Allen (N. B. Rep.), 394. The note in this case was in the following form : "In the month of May, next, I promise to pay L. S., or bearer, £38 15s. 6d., with interest, for value received, payable in logs delivered at his mill, — scantling

logs at £3 per hundred, and deal logs at £4 per hundred. The logs to be straight, round, and sound, and none of them smaller than eleven inches at the small end." The declaration was framed under the statute, without alleging special damage ; and, under the holding of the court, the defendant's plea of set-off was sustained. We think, in this case, had the declaration been on the contract, alleging and proving special damage, as well as the consideration for the defendant's promise, that such action would have been sustained. While it was not found necessary to decide this question, the court went as far as to express the opinion, in effect, that such action would not lie under the statute, but that the declaration would have had to have been as at common law ; the consideration and special damages being alleged and proved. In *Church v. Feterow*, 2 Pa. 301, it was held, in effect, that where a note is given for the payment of a certain sum of money, within a certain time, to be paid in specific articles ; if the specific articles are not delivered, or offered to be delivered, within the agreed time, the agreement then becomes an absolute one for the payment in money of the sum stipulated by the contract, and the maker of the note no longer has the right to pay the amount in the specific articles ; the claim of the payee having then become one for a liquidated and ascertained sum. This, we think, is really the meaning of the court, and the actual *ratio decidendi* of the case ; although the express language of the court goes a little farther than this. See *Barbe v. Parker*, 1 H. Bl. 283 ; *Harris v. Fowle*, cited *Id.*, 287 ; *Campbell v. Sewell*, 1 Chitty, 609 ; *Mussen v. Price*, 4 East, 147 ; *Hoskins v. Duperoy*, 9 East, 498, 501 ; *Nickson v. Jessom*, 2 Stark. 227 ; *Hiehling v. Hardey*, 7 Taunt. 312 ; *Lee v. Risdon*, 7 Taunt. 188 ; *Hutchinson v. Reid*, 3 Campb. 329 ; *Keys v. Harwood*, 2 C. B. 905 ; *Groom v. West*, 8 A. & E. 758 ; *Gibson v. Bell*, 1 Bing. N. C. 743 ; *Dutton v. Solomonson*, 3 B. & P. 582 ; *Brook v. White*, 1 B. & P. N. R. 330 ; *Raymond v. Bearnard*, 12 Johns. 274 ; *Jennings v. Camp*, 13 Johns. 94 ; *Clark v. Smith*, 14 Johns. 326 ; *Robertson v. Lynch*, 18 Johns. 451 ; *Dubois v. Delaware & Hudson Canal Co.*, 4 Wend. 289 ; *Talver v. West*, Holt, 178 ; *Weston v. Downes*, Doug. 23 ; *Towers v. Barrett*, 1 T. R. 133 ; *Davis v. Street*, 1 C. & P. 18 ; *Clark v. Fairfield*, 22 Wend. 576 ; *Way v. Wakefield*, 7 Vt. 223, 228 ; *For-syth v. Jarvis*, 1 Stark. 437 ; *Harrison v. Luke*, 14 M. & W. 139.

Herrick v. Carter, 56 Barb. 41, although

The transaction here is no less a sale and purchase of the goods than if the payment were in money.

we think it is, unquestionably, wrongly decided, is an important one on the subject of barter or exchanges of goods, or the equivalent thereof, sales of goods payable in goods. In the New Brunswick case stated above, *Steeves v. Hopper*, 1 Allen (N. B. Rep.), 394, the inclination of the court evidently was (Chipman, C. J., a very able lawyer, delivering the judgment), had it been necessary to have decided the question, to have held, and we think correctly so, that a sale of goods payable in goods is, while technically an agreement for the barter or exchange of goods, also a double sale of the goods; each of the parties being a seller and each a buyer, and all of the warranties usually, as of right and power to sell (Anon., 3 Salk. 157); the statute of frauds, etc. (see *infra*, our Book on Statute of Frauds), attaching to each of the sales as in an ordinary case of the sale of goods for money, or on credit, or for any of the representatives of money, checks, bills of exchange, promissory notes, etc. And therefore, on the same principle, for the non-delivery of the goods by either of the parties, an action for special damages for such non-delivery would lie at the suit of the other party.

Herrick v. Carter, 56 Barb. 41, decides the very opposite of this, we think, undoubtedly correct principle. As the question in this country, where such transactions are so very common, is one of very great importance, we state the case quite fully. The action was brought to recover the value of nails, which the plaintiffs were to receive from the defendant, at the price of \$5.37½ per 100 lbs., for certain dry goods which the defendant had purchased and received from the plaintiffs. On the trial the nails were found to be of the value of \$8 per 100 lbs. Part of the nails were delivered, leaving a balance of \$191.92 payable in nails at the rate of \$5.37½ per 100 pounds; or (including interest) at the proved value of the quantity of nails required to be delivered to meet the balance due, \$8 per 100 lbs.; \$288. Judgment for this amount, on the finding of the referee, was entered for the plaintiffs. The referee further found that the agreement and transaction between the parties was a purchase by the plaintiffs and a sale by the defendant of a quantity of nails at an agreed price, to be, and was then, paid for by the plaintiffs in dry goods; and on the part of the defendant, a purchase of the plaintiffs of dry goods at an agreed price, to be paid for in nails at an agreed price; that the nails were purchased by the plaintiffs and the goods by the defendant, each

for the purpose of trade, and by the terms of the contract no money was to be paid by either party; the intention of the plaintiffs being the purchase of nails; of the defendant, the purchase of dry goods. The evidence fully sustained this finding. The following is the effect of the evidence: The goods sold were to be paid for in nails at \$5.37½ per 100 lbs. The nails in question were purchased by the plaintiffs from the defendant and paid for by sale of dry goods. The nails were bought for the purpose of selling at a profit. There was no agreement or understanding between the plaintiffs and defendant that the goods were to be paid for in money, or in any other way except in nails. No other kind of payment was intended. The nails were purchased or contracted for by the plaintiffs for the purpose of selling them at a profit to their customers. Here clearly was a barter or exchange of dry goods at an agreed price, payable in nails at an agreed price; or a sale of the dry goods on the one hand, payable in nails at a specified price, which, therefore, specifically fixed the quantity; and on the other hand, a sale of the specifically fixed quantity of nails, by the defendant to the plaintiff, paid for in dry goods at an agreed price. The Supreme Court of New York on the contrary, reversing the judgment on the clearly correct finding of the referee, expressly held that it was a sale of the dry goods payable in nails; but that it was *not* a sale of the nails payable in dry goods, nor was it even an exchange of the dry goods for the nails. Yet how, when the dry goods were given for the nails, and the nails were to be given for the dry goods, it was not an agreement for an exchange of the dry goods for the nails, is inexplicable; and against those writers who claim that a barter or exchange is substantially not a sale; the case really holds that a barter or exchange is a sale, and is not a barter or exchange at all! And again, when the dry goods were given for the nails, and the nails were to be given for the dry goods, why this was not as much an agreement for the sale of the nails, payable in the dry goods, as it was for the sale of the dry goods, payable in nails, is certainly rather puzzling. The judgment, which is the unanimous judgment of the court, delivered by Foster, J., is, we think, transparently unsound. The following extract from it fairly summarizes the judgment: "I think it would be a manifest perversion of the testimony to call it a purchase of nails, to be paid for in dry goods, or even an exchange of nails

The following cases in this connection will be found of interest and importance : —

for dry goods. No quantity of nails was bargained for. No amount in *value* of nails was specified. [The quantity and price of the dry goods, and the agreed price of the nails fixed this.] But the defendant from time to time *bought dry goods* of the plaintiffs in such quantities as he desired, and those amounts *were to be paid for in nails*, and it seems as though the only apology for the conclusions of the referee is that the plaintiffs swear they wanted the nails to sell to their customers and at a profit, and *yet they kept only a dry goods and boot and shoe store.*" As a matter of fact, the keeping of a general store for selling dry goods and boots and shoes, would not affect their power to sell nails as well to their customers ; and even if such a thing as that would affect the construction of the contract, the evidence shows on that point nothing else than that the plaintiffs bought the nails (payable in goods) to sell them again. The court felt themselves bound to assume, and alike from the evidence and the unquestionably correct finding of the referee, they had no escape therefrom, that the transaction was a *purchase* by the defendant of the dry goods in question at a price agreed upon, on credit, and to be paid for thereafter in nails at a fixed price. Then what was the contract ? To furnish a sufficient quantity of nails to pay at a specified valuation (\$5.37½ *per* 100 lbs.) for dry goods bought for a specific sum. Then if the defendant failed to perform his agreement, and did not deliver such fixed, ascertained quantity of nails, was he not liable for the direct damages resulting from his breach of contract ? And would not these damages be such as would directly result to the plaintiffs from the defendant's failure to deliver the quantity of nails which for a valuable consideration he had agreed to deliver ; as such damages were correctly estimated by the referee in the case ? Clearly so. But this question of damages is the subject of investigation in a later portion of this work. On the main question in *Herrick v. Carter*, 56 Barb. 41, the misstated decision of *Anonymous*, 3 Salk. 157 (see 1 Pars. on Con. 521 and *n. g.*), is much sounder law. "*In exchanging, both parties are buyers and sellers, and both equally warrant.*" See *supra*, p. 4.

So, also, in the later New York case of *Hudson Iron Co. v. Alger*, 54 N. Y. 173, 177, which we have above examined (see *ante*, p. 19, *n.*), where an agreement for an *exchange* of a specific quantity of iron ore for a specific quantity of pig-iron was held in effect to be, not only

an exchange of the iron ore for the pig-iron, but a sale of the iron ore for the pig-iron, and a sale of the pig-iron for the iron ore. This decision of the Commission of Appeals is an emphatic reversal of the badly decided case of *Herrick v. Carter*, 56 Barb. 41. This latter case is in principle opposed by the case of *Hardcastle v. Netherwood*, 5 B. & Ald. 93, which was a case of special assumpsit. Consideration, — that the plaintiff, for the accommodation and at the request of the defendant, would accept certain bills of exchange, and would deliver them, so accepted, to the defendant, in order that he might negotiate them for his own benefit, the defendant undertook to provide money for the payment of the bills as they became due, and to indemnify the plaintiff from any loss or damage by reason of the acceptance thereof. Breach, — that defendant did not provide money for the bills, nor indemnify the plaintiff from damage ; by reason whereof the plaintiff, as acceptor, was forced and obliged to pay to the holders of the bills certain sums of money, with interest, charges, and expenses. *Held*, upon demurrer, that, as plaintiff might be entitled to recover special damages, a set-off was not a good plea. See further, *Mitchell v. Gill*, 12 N. H. at p. 395 ; *Shaw v. Nudd*, 8 Pick. 9 ; *Gainsford v. Carroll*, 2 B. & C. 624 ; *Leigh v. Patterson*, 2 Moore, 588 ; *Peterson v. Ayre*, 13 C. B. 353.

In the *First National Bank v. Reno*, 73 Iowa, 145, where there was a sale of land to be paid for in part in hogs and grain, it was held that there was a sale of the latter, and that, under the contract, the property in them passed to the vendor of the land, — the vendee of the hogs and grain. And in *Galway v. Shields*, 66 Mo. 313, where there was an action for goods sold and delivered, the goods having been sold by the plaintiff to the defendant as the consideration for the purchase of lands by parol, which the defendant was willing to convey, the Supreme Court of Missouri, reversing the judgment of the St. Louis Court of Appeals, held, that the plaintiff was only entitled to be paid for the goods in the lands, notwithstanding the statute of frauds, so long as the vendor of the lands was willing to convey them. And in *Lane v. Shackford*, 5 N. H. 130, the court held the same doctrine, thus : "If one man contracts with another to perform labor, and receive as a compensation the conveyance of a particular tract of land, although the contract to convey the land is not a proper foundation for an action,

The South Australian Insurance Co. v. Randell¹ is a case, where, making no distinction between a sale and a barter, a

yet still common honesty and fair dealing require that he shall not be at liberty to refuse the land and demand money, until the other party has refused to execute the contract." *Richards v. Allen*, 17 Me. 296; *Bedinger v. Whittimore*, 2 J. J. Marsh. 563; *Collier v. Coales*, 17 Barb. 473; *Coughlin v. Knowles*, 7 Met. 57; *Wetherbee v. Potter*, 99 Mass. 361; *Sims v. Hutchins*, 8 Sm. & Mar. 331; *Shaw v. Shaw*, 6 Vt. 69; *Philbrook v. Belknap*, 6 Vt. 383; *Hawley v. Moody*, 24 Vt. 605, are to the same effect. See also *Lane v. Shackford*, 5 N. H. 130; *Dowdle v. Camp*, 12 Johns. 451; *Crane v. Gough*, 4 Md. 333; *Kratz v. Stocke*, 42 Mo. 354; *Self v. Cordell*, 45 Mo. 345; *McDonald v. Lynch*, 59 Mo. 350.

In *Dow v. Worthen*, 37 Vt. 108, which was an action in assumpsit for not receiving a lot of poultry, the plaintiff purchased the poultry in question from one H., under the authority of and as agent for the defendant, the statute of frauds being relied on as a defence. The plaintiff previously, under an order for ten or twelve barrels of apples, sent H. twenty barrels, with word that he would take back what H. could not sell. H., on subsequently meeting the plaintiff, told him that he would take the whole of the apples, and pay him both for what he had sold and what he had on hand unsold. Plaintiff, however, told him he need not do so; and on buying the poultry, for the non-receiving of which the action was brought, the price of the apples was agreed on at \$75, and this was agreed on between the plaintiff and H. as a part payment for the poultry. No part of the poultry was delivered, and there was no written evidence of the agreement. The court held, that as between the plaintiff and his principal, the defendant, the sale of the poultry was taken out of the statute. See *infra*, Statute of Frauds, where the whole subject is fully considered. See *Houghton v. Ross*, 54 Mich. 335, where, the facts not showing that the property in horses had vested in plaintiff by an alleged parol exchange, the court held that, this being so, there could have been no transfer of title without some agreement of sale carried out by payment of earnest or price, or by delivery.

In *Huthmacher v. Harris's Admrs.*, 33 Pa. St. 491, it was held that the purchaser of a "drill machine," in which the vendor's intestate had concealed money and valuable securities, acquired no title to the money and securities, by the pur-

chase of the machine,—the contract of sale, like all other contracts, being controlled by the clearly ascertained intention of the parties; and it not having been within the contemplation or intention of the contracting parties to the sale of the drill machine that the money and securities should pass by such sale, they did not do so.

In *Fuller v. Duren*, 36 Ala. 73, it was held, that an action for money had and received would not lie where there had been a barter or exchange of the plaintiff's goods by the defendant, and where the goods received were not taken at a money valuation, and were not subsequently sold by the defendant. The court said: "Inasmuch as assumpsit lies only upon a promise, express or implied, and not to recover damages for torts or trespasses, a mere conversion of the goods of the plaintiff, without any sale of them, will not support the action. The doctrine of waiving a tort and bringing assumpsit is confined to cases where the defendant has disposed of the plaintiff's property, and received either money, or some article or thing as money. *Pike v. Bright*, 29 Ala. 336; *Crow v. Boyd*, 17 Ala. 51; *Strother v. Butler*, 17 Ala. 733. If the property has been sold, it makes no difference whether the price is received in money, or in a chattel at an estimated price, for money. *Ames v. Ashley*, 4 Pick. 71; *Mason v. Waite*, 17 Mass. 560; *Stewart v. Corner*, 9 Ala. 813; *Cameron v. Clarke*, 11 Ala. 259."

In the case of *tort* assumed, *trover* or *replevin* would lie. The owner of goods, if a wrong-doer by sale converts them into money, or into that which is received as the price and the equivalent of money, may waive the tort, and recover the money or the price. The recovery would be limited to the price received, or agreed upon, without regard to the value of the goods; while if he sued in *trover* for the conversion, the value of the goods, whatever may have been the price for which they were sold, would be the measure of damages. *Whilden v. Merchants*, etc. Bank, 64 Ala. 1, 27. In *Vail v. Strong*, 10 Vt. 457, it was held that in legal strictness an averment of a sale is not supported by the proof of an exchange, particularly in a special action on the case. See *Wright v. Geer*, 6 Vt. 151. But see, where the action is in assumpsit, *Porter v. Talcot*, 1 Cow. 359; *Felton v. Dickenson*, 10 Mass. 287; *Cotterell v. Cuff*, 4

¹ L. R. 3 P. C. 101.

transaction whereby the property in goods was to pass, "the price being to be paid *in kind* or in money,"¹ was held, to be "a sale." The question arose under a claim for loss under a policy of fire insurance, where goods were insured; the policy containing the usual clause that goods held on trust or commission must be insured as such, otherwise the policy would not extend to cover them. The plaintiffs were millers, carrying on business in Australia, and their mode of doing business was to receive from farmers, to whom their mode of doing business was well known, wheat, which, on receipt, was shot out of bags in the presence of the farmers who brought it, into large coffers, where it became mixed with other wheat similarly received by the plaintiffs, on part of which advances had been made to the farmers by the plaintiffs. The wheat thus mixed lost its identity and became the current stock of the plaintiffs, which, according to their course of dealing known to the farmers, was either sold as wheat by the plaintiffs or ground in their mill. The plaintiffs could do what they liked with it. If ground, the flour produced from such stock was sold and otherwise dealt with by the plaintiffs as they thought fit, and as their own property. It never was intended by the parties that the identical wheat delivered by the farmers should be returned to them. The farmer could at any time demand an equal quantity of wheat of like quality with that delivered by him to the plaintiffs, or the market price of an equal quantity, fixing the price as of the day on which he made his demand. The plaintiffs had the option of delivering wheat of like quality or paying such market price. On the trial the defendant's counsel applied for a non-suit on the ground that the wheat was held in trust, and was not the property of the plaintiffs. A non-suit was refused, and the verdict was entered for the plaintiffs. On motion to enter the verdict for the defendants, the court (the Supreme Court for South Australia) was equally divided on the question whether the property in the wheat when delivered was vested in the plaintiffs beneficially, as their own property, and was not property held in trust; and the verdict for the plaintiffs being thereby sustained, the defendants appealed to the Privy Council. The judicial committee, in dismissing the appeal, concluded that it was not

Taunt. 235, and other cases cited in this note.

Under the Act 1 & 2 Wm. 4, c. 37, s. 3, payment in certain trades, of wages in goods, or otherwise than in the current coin of the realm, is prohibited. It was held, in *Athersmith v. Drury*, 5 Jur. N. S. 433, where the defendant gave the artificer a "note for the shop," for which the defendant knew, and intended, that the arti-

ficer would be compelled to take goods, that the conviction of the defendant under the act was proper; the place where the note was given being within the jurisdiction of the convicting justices, although the "shop" where the goods were delivered for the note, was without their jurisdiction.

¹ Page 106.

the case of a possession given, subject to a trust, but that it was the case of "a property transferred for value," at the time of delivery, upon special terms of settlement; that it comes to this, that, "where goods are delivered upon a contract for a valuable consideration, *whether in money or money's worth*, then the property passes. *It is a sale*, and not a bailment." Here, it is clear, that a sale and a barter are virtually treated as synonymous (whether payable "in money or money's worth"), and where goods are delivered upon a contract for a "valuable consideration," it is here called "a sale," though the language in its width clearly includes that kind of a sale which is payable in "money's worth," or a barter.¹

¹ The case of *Seymour v. Brown*, 19 Johns. 440, holds *contra* to the South Australian Insurance Co. v. *Randell*, L. R. 3 P. C. 101, but *Seymour v. Brown* has been often questioned, and has been more often than once overruled. See *Smith v. Clark*, 21 Wend. 83; *Buffum v. Merry*, 3 Mason, 478; *Hurd v. West*, 7 Cow. 752, 756; *Ewing v. French*, 1 Blackf. 353, 355; *Newton v. Woodruff*, 2 Const. 153; *Chase v. Washburne*, 1 Ohio, 244.

Where there is a mixing of goods, so that the several portions cannot be distinguished; if the intermixture be by consent, the proprietors have an interest in common in proportion to their respective shares. But if one wilfully intermixes his money, or goods, with those of another, without the latter's knowledge or consent, the civil law gave the property in the whole to the innocent party, but allowed a satisfaction to the other. But the common law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded and endeavored to be rendered uncertain without his consent. 2 Bl. Com. 405; 2 Inst. t. 1, pl. 27, 28; Poph. 33; 2 Bulstr. 325; 1 Hale P. C. 513. Where the mixing (*commixtio*) is not wrongful, it has no effect upon the rights of the respective owners, if separation is practicable; but, if not, a joint ownership is created. 2 Inst. t. 1, pl. 28; Mackelley, *Systema Juris Romani hodie usitati*, §§ 251, 252; 2 Kent's Com. § 539; Jones v. Moore, 4 Y. & C. 351-356; Young v. Matthews, L. R. 2 C. P. 127. See *Pearce v. Schunch*, 3 Hill, 28; *Wadsworth v. Alcott*, 2 Seld. 64; *Schutz v. Jordan*, 32 Fed. Rep. 55; *Ryder v. Hathaway*, 21 Pick. 298; *Pratt v. Bryant*, 20 Vt. 333; *Bond v. Ward*, 7 Mass. 127; *Sawyer v. Merrill*, 6 Pick. 477; *Shumway v. Rutter*, 8 Pick. 443; *The Idaho*, 93 U. S. 575; *Mayor of Carlisle v. Wilson*, 5 East, 2, 7, *per* Lord Ellenborough.

In *Johnston v. Browne*, 37 Iowa, 200, 204, the principle was recognized, that where the various owners of property of the same kind, and of equal value, consent to a mixture of the same, and the proportionate shares are known, the loss of identity does not prevent each owner from claiming his proportionate share. In *Young v. Miles*, 20 Wis. 615, the plaintiff was the owner of a quantity of wheat, which, with his consent, was stowed in mass with that of others in a warehouse. After shipments had been made from the mass until a quantity not greater than that due him was left, it was held, that this was his absolute property as against the warehouseman, and that any invasion of that quantity by the latter was a wrongful conversion, and that the plaintiff could follow the wheat wherever it could be identified. So, in *Gardner v. Dutch*, 9 Mass. 427, replevin was maintained for 76 bags of coffee, part of 396 bags of the same kind, the residue of which belonged to other persons, and from which the 76 bags were not distinguishable, and had not been separated. And in *Stearns v. Raymond*, 26 Wis. 74, it was held that where logs unlawfully cut upon the land of another, were intentionally intermixed by the trespasser with logs of his own, so that the former could not be distinguished from the latter, the owner of the former might replevy the amount of logs belonging to him, from the common mass. The authorities on the subject are in irreconcilable conflict. We do not stop here to examine them critically. See *Dawson v. Osborn*, 1 Pick. 476; *Austen v. Craven*, 4 Taunt. 644; *White v. Wilks*, 5 Taunt. 176; *Busk v. Davis*, 2 M. & S. 397; 5 Taunt. 622; *Zagury v. Furnell*, 2 Campb. 240; *Shepley v. Davis*, 5 Taunt. 617; *Low v. Martin*, 18 Ill. 236; *Dillingham v. Smith*, 30 Me. 270; *Loomis v. Green*, 7 Greenl. 386; *Lupton v. White*, 15 Ves. 432; *Scudder v. Worster*, 11 Cush. 573;

So Sir William Jones, in his treatise on Bailments, is to the effect that wherever there is a delivery of property on a contract for an equivalent in money or some other valuable commodity, and not for the return of the identical subject-matter in its original or an altered form, *this is a transfer of property for value. It is a sale*, and not a bailment.¹ Thus, that kind of sale known as a barter, which is a delivery of property on a contract for an equivalent in some other valuable commodity, and not in money, is, like such a delivery for an equivalent in money, treated and described here as a "sale."

The case of *Very v. Watkins*,² is a peculiar one, arising out of *Very v. Levy*,³ in which latter case an agreement to pay a debt in specific

Young v. Miles, 20 Wis. 623; 23 Wis. 643; *Ledyard v. Hibbard*, 48 Mich. 421; *Hutchinson v. Hunter*, 7 Barr, 140; *Golder v. Ogden*, 15 Pa. St. 528; *Waldo v. Belcher*, 11 Ired. 609; *Merrill v. Hunnewell*, 13 Pick. 213; *Horr v. Barker*, 6 Cal. 489; *Kimberley v. Patchin*, 19 N. Y. 330; *Pleasants v. Pendleton*, 6 Rand. 475; *Woods v. McGee*, 7 Ohio, 127; *Jackson v. Anderson*, 4 Taunt. 224; *Whitehouse v. Frost*, 12 East, 614; *Crofoot v. Bennett*, 2 Comst. 258; *Gardner v. Snyder*, 3 Seld. 357; *Bond v. Ward*, 7 Mass. 123; *Hart v. Ten Eyck*, 2 Johns. Ch. 108; *Panton v. Panton*, 1 Str. 505; *Lord Chedworth v. Edwards*, 8 Ves. 46; *Ex parte Townsend*, 15 Ves. 470; *Sexton v. Graham*, 53 Iowa, 189; *Diversey v. Johnson*, 93 Ill. 569. Mr. Sumner, in his note to *Lupton v. White*, 15 Ves. 432, says: "An agent is bound to keep the property of his principal distinct from his own, and if he mixes it with his own, the whole will be taken, both at law and in equity, to be the property of the principal, until the agent shows clearly and satisfactorily the part that belongs to himself and the part that belongs to his principal. If the goods can be easily distinguished and separated, then no damage of property takes place, and each party may lay claim to his own. If the goods are of the same nature and value, although not capable of an actual separation by identifying each particular; yet, if a division can be made of equal value, as in the case of a mixture of corn, or coffee, or tea, or wine of the same kind and quality, there each may claim his aliquot part. But if the mixture is undistinguishable, and a new ingredient is formed, not capable of just appreciation and division, according to the original rights of each, the party who occasions the wrongful mixture must bear the whole loss." Blackburn says: "Till the parties are agreed on the specific

individual goods, the contract can be no more than a contract to supply goods answering a particular description, and since the vendor would fulfil his part of the contract by furnishing any parcel of goods answering that description, and the purchaser could not object to them if they did answer the description, it is clear there can be no intention to transfer the property in any particular lot of goods more than another, till it is ascertained which are the very goods sold." We doubt very much the correctness of this conclusion. We examine the subject fully in discussing the question of the Passing of Property in Goods, in a later volume of this work. See *Fishback v. Van Dusen*, 33 Minn. at p. 122.

Various quantities of tallow, the property of different persons, were deposited in warehouses on a bank of the Thames. A fire took place, in consequence of which the tallow melted and flowed down into the main sewers, and thence into the river, from which several portions of it were unwarrantably taken by different persons. A., one of these persons, sold some of it to B., which was taken from him by the police, and he was charged before a police magistrate with the possession of tallow supposed to have been stolen or unlawfully obtained. The magistrate dismissed the charge, but ordered the tallow to be detained, under 2 & 3 Vic. c. 71, s. 29, and it was sold by direction of the commissioner of police before the twelve months limited by sec. 30 of that act had expired. It was held that A. had no property in the tallow entitling him to maintain an action against C. (the purchaser) for its conversion. *Buckley v. Gross*, 3 B. & S. 566.

¹ Pp. 64 and 102, 3rd ed.

² 23 How. 469.

³ 13 How. 345.

articles was enforced. In March, 1841, Levy gave his obligation with a mortgage of \$4000, with interest, due six years after date, to one Lindsley, who assigned the obligation to Very. In March, 1843, Levy paid to Very \$2000, and at the same time executed a promise in writing to pay the residue of the debt in jewelry and other wares, which Very agreed to receive in payment, to be selected within a year from that time, from Levy's stock of goods. Very refused to perform the agreement, and in 1848 brought an action on the original obligation, to which Levy proved the agreement by way of accord and satisfaction, with an offer to perform on his part. The Supreme Court of Arkansas, on an appeal, held it to be in equity a clear accord and satisfaction, because the creditor by that arrangement received payment of nearly half of the debt in advance, and because the residue was to be paid almost four years before the debt became due. In the mean time Very brought a bill to foreclose the mortgage, to which Levy set up the same defence by way of answer. In April, 1850, the court sustained the defence of Levy, and decided that Very should select from the stock of goods in question a sufficient amount according to their value as it was in March, 1843, to satisfy the rest of the debt. A receiver was then appointed to receive such goods as might be brought into court. In consequence of Very's refusal to abide by his agreement, Levy was obliged to keep his stock of goods on hand to tender them to Very, according to the agreement. Levy had other creditors, who seized upon the same goods in execution, and they were in possession of the sheriff, who delivered them to the receiver. The next step was an order from the judge of the court, directing Very to select from a box of jewelry held by the receiver such an amount, according to the value of the goods in March, 1843, as would be sufficient to discharge the balance of the debt due to him. This he refused to do; and the clerk of the court, under directions, selected \$2002.59 out of \$5777, the value of the goods in 1843, to pay Very's claim, and set them apart. The balance of the goods was then withdrawn, and Very was adjudged to take the selected goods in payment of the residue on the bond and mortgage. Very refused to abide by the decree and appealed, when the decree was affirmed. Very then refused to pay the costs which Levy had to pay, and to satisfy these costs an execution was issued, and the selected goods were sold under it, realizing but \$260, their then value. After some lapse of time Very brought an action against Watkins, the security of the receiver, for non-delivery of the goods. The court held that the selected goods were the property of Very, and as such were liable for his debts,

and which were as well leviable upon in the hands of the receiver as any other property, and the decision in the court below to that effect was affirmed by the United States Supreme Court.¹

Where a creditor agreed to take from his debtor goods in payment of a bond and mortgage, the Circuit Court for Arkansas held that the creditor was bound by his agreement. The Supreme Court of the United States sustained the decision,² holding that an

¹ A general agent to receive payment of a debt is bound to receive it in money only, unless otherwise directed. *Martin's Admr. v. The United States*, 2 Monroe, 90. As a general rule, judicial sales must be made for cash. *Williamson v. Berry*, 8 How. 495; *Walden v. McComb*, 1 Hill, 111; *Bloomer v. Waldron*, 3 Hill, 361. And a mortgage of a chattel with power of sale confers no right to exchange the mortgaged property for other property, or to sell it for anything but money. *Edwards v. Cottrell*, 43 Iowa, 194, 204; *Bigley v. Risher*, 63 Pa. 155. In *Edwards v. Cottrell*, 43 Iowa, 194, the court said: "Where a party mortgages a chattel with a power of sale, he is entitled to the excess of the proceeds of the sale over the amount of the debt secured, and the mortgagee has no right, without the consent of the mortgagor, to barter the mortgaged property for other, or to compel the mortgagor to take in anything else than money the excess in value of the mortgaged property over the debt secured." In *Gullett v. Jervis*, 3 Stew. 23, 27, the court held that when a note is placed in the hands of an attorney-at-law to collect, the only power granted to him is to receive the money if the maker will pay it, or else enforce its payment by suit. He has no right to dispose of the note in payment of his own debts, or by compromise to receive goods or horses, or anything but cash, in discharge of the maker's responsibility. A. and B. made their joint note to C. payable on the first of November following, with a condition that the note might be discharged in salt at \$1.12½ per bushel. The salt not being delivered at the time stipulated, the low stage of the water preventing it, it was held that the money was due; that the plaintiff was not bound to receive the salt after the day specified, and that his agent exceeded his authority in so accepting it. *Stewart v. Donnelly*, 4 Yerg. 177. So in *Guerreiro v. Peile*, 3 B. & Ald. 616, on the ground that where a factor sells the goods of his principal it is his duty to keep that sale wholly unconnected, and not to mix other matters with it to the detriment of his principal, it was held that a factor has an authority to sell for money, but not to barter. And therefore where a factor bar-

tered the goods of his principal, no property passed, and it was held that the principal might maintain trover against the party with whom the goods were bartered, although the latter was wholly ignorant that he had been dealing with a factor only. It was pointed out in this case, as has been done by us in the text, that a barter really constitutes two sales. Where the factor, then, is but the agent of his principal to sell goods, and not to purchase other goods, it is clear on that ground that he exceeds his authority in completing the double transaction. See *Anonymous*, 12 Mod. 514; *Wiltshire v. Sims*, 1 Campb. 258; *Fox v. Fisk*, 6 How. (Miss.) 328, 346; *Scrimshire v. Alderton*, 2 Str. 1182; *Wright v. Campbell*, 4 Burr. 2046; *Gonsales v. Sladen*, Bull. N. P. 130; *Dinkwater v. Goodwin*, Cowp. 251; *Walker v. Birch*, 6 T. R. 261.

Even when the time of payment is not anticipated, the law deems the delivery of specific articles a good satisfaction of a money debt, because it will intend them to be more valuable than the money to the creditor who has consented to the arrangement. *Bac. Ab. Accord, A.*; *Pennell's Case*, 5 Co. R. 117; *Booth v. Smith*, 3 Wend. 66; *Kellogg v. Richards*, 14 Wend. 116; *Steinman v. Magnus*, 11 East, 390; *Lewis v. Jones*, 4 B. & C. 513. The payment in goods of a debt extinguishes the original obligation, and is pleadable in bar of the action for the debt at law. *Case v. Barber*, Sir T. Raym. 450; *Thatcher v. Dudley*, 2 Root, 169; *Good v. Cheeseman*, 2 B. & Ad. 328; *Cartwright, Admr. v. Cook*, 3 B. & Ad. 701; *Coie v. Houston*, 3 Johns. Cas. 243; *Boyd v. Hitchcock*, 20 Johns. 76; *Watkinson v. Inglesby*, 5 Johns. 386; *Strong v. Holmes*, 7 Cow. 224; *Brooks v. White*, 2 Met. 283; *McCreary v. McCreary*, 5 Gill & J. 147; *Downer v. Sinclair*, 15 Vt. 495. Where any other articles than money are received, and agreed to be accepted in full satisfaction of a debt, the court will not estimate their value in money's worth, but hold the consideration to be good, and the promise to discharge the entire debt a valid contract. *Brooks v. White*, 2 Met. 283; *Boyd v. Hitchcock*, 20 Johns. 76; *Kellogg v. Richards*, 14 Wend. 116.

² *Very v. Levy*, 13 How. 345.

agreement by a creditor to receive specific articles in satisfaction of a money debt, is binding on his conscience; and if he ask the aid of a court of equity to enforce the payment, he can receive that aid only to compel satisfaction in the mode in which he has agreed to accept it. A court of equity will even go farther, and in a proper case, will enforce the execution of such an agreement. At law a mere accord is not a defence; and before breach of a sealed instrument, there is a technical rule which prevents such an instrument from being discharged except by matter of as high a nature as the deed itself.¹ But no such difficulties exist in equity. On the broad principle that what has been agreed to be done shall be considered as done, the court will treat the creditor as if he had acted conscientiously, and accepted in satisfaction what he had agreed to accept, and what it was his own fault only that he has not received. Indeed, even a court of law, in a case free from the technical difficulties above noticed, will do the same thing.²

An agreement to pay "in the paper of the Miami Exporting Company, or its equivalent," is satisfied by a tender of the paper of that company, and the promisee can recover in specie only its market and not its nominal value.³ The Supreme Court treated the agreement in this case, to pay, as amounting to nothing more than an agreement to deliver a certain quantity of flour or any other commodity on a given day. The court said: "The notes of the Miami Exporting Company purported to be money, and may, to some extent at the time, have circulated as such in business transactions; but it is manifest they were not considered as money by the parties to this contract, but as a commodity, the value of which was to be ascertained by the amount of specie it would bring in the market. And if it should not be convenient for the defendant to make the payment in these notes, he was permitted to make it, by the contract, in any other depreciated notes of equal value. The defendant failed to make the payment at the time, and is he now bound to pay the nominal amount of these notes in specie? What damage has the plaintiff sustained by the non-payment? Certainly not more than the value of the notes, if they had been paid."⁴ And the actual value of the notes was held to be all the plaintiff was entitled to recover.⁵

¹ Alden v. Blague, Cro. Jac. 99; Kaye v. Waghorne, 1 Taunt. 428; Bayley v. Homan, 3 Bing. N. C. 915.

² Bradly v. Gregory, 2 Camp. 383.

³ Robinson v. Noble's Administrators, 8 Peters, 181.

⁴ *Ibid.*, at p. 199. And see our view, in note 2 to p. 10, *ante* (at p. 14), con-

firmed by this case in the United States Supreme Court.

⁵ Courtois v. Carpentier, 1 Wash. C. C. 376, is a case where a note was made in Guadeloupe for 7812 livres, payable in sugar as money. The court held that, the action having been brought in this country, the judgment could not be ren-

On an application to place the name of a holder of shares on the list of contributories of a company formed for running the blockade of the Confederate States, it appeared that the managing director had agreed to accept Confederate bonds in payment of the amount due for the shares, and that the shareholder was credited with the amount in the company's ledger, and his shares entered as fully paid up. A letter was subsequently written by the managing director to the shareholder, intimating that payment in bonds would be taken from subscribers for increased capital for only so much as they produced in money. The bonds, at the time they were accepted, were salable at the price at which they were received in payment, but afterwards became worthless. Held, that the directors had power to receive money's worth in payment of shares; that the Confederate bonds having been accepted as payment, and the shareholder credited with the amount, and the shares entered as fully paid up, he could not now be placed in the list of contributories, and that the letter of the director, having been written after the agreement was part performed, did not invalidate the original transaction.¹

dered in sugar, but "the value in money must be given, which in effect is the precise sum stated in the note." As these sugar notes in Guadeloupe formed a kind of circulating medium, and really represented in cash but about one-third of their nominal amount, and as the transaction was governed by the *loci contractus*, we very much question the soundness of the case. The case put by the court, of a suit on a bond which would only sell at a discount, is not at all analogous. There the bond is made payable in money, for the amount of which, of course, judgment will be rendered. It may be, even then, that the judgment would only sell at as great a discount as the bond would have sold at, but that does not affect the question. We think the decision in *Robinson v. Noble's Admrs.*, 8 Peters, 181, the sounder one, on the state of facts, in the two cases. See, further, *Roberts v. Beatty*, 2 Penn. R. 63; *Green v. Moffat*, 1 Halst. 461; *Shrewsbury v. Buckley*, 4 Bibb, 260; *Thomas v. Roosa*, 7 Johns. 461; *McCormick v. Trotter*, 10 S. & R. 94; *Cutler v. How*, 8 Mass. 257; *Keith v. Jones*, 9 Johns. 120; *Wharton v. Morris*, 1 Dall. 125. In *Clay v. Huston*, 1 Bibb, 461, it was held that on a contract to deliver "thirty pounds in militia certificates," without mentioning a day for performance, the value of the certificates at the date of the promise was the measure of damages. For other cases of payment in specific articles, see *Whipple v. Swett*, 2 Mason, 89; *Shepherd v. Hampton*, 3

Wheat. 200; *Gilpins v. Consequa*, 1 Pet. C. C. 85; *Douglass v. McAllister*, 3 Cranch, 298; *Edgar v. Boies*, 11 S. & R. 445; *Hopkins v. Lee*, 6 Wheat. 109. These cases will be found to harmonize in principle with *Robinson v. Noble's Admrs.*, 8 Peters, 181.

¹ *In re* Mercantile Trading Company, *Schroder's Case*, L. R. 11 Eq. 131. In delivering the judgment, Malins, V. C., in considering the question of the validity of a contract to pay in money's worth, said: "Upon the authorities which have been cited to me, it is perfectly clear to my mind that there is no such principle as that a company may not receive payment of its shares in money or money's worth. I know that in one of the cases in this company which was before me, a shareholder instead of paying money paid in tea, as he was a dealer in tea. I thought that a perfectly valid payment, because the object of the company was to send tea and all other things that were required by the Confederate government, to the Confederate States, and if they found it more convenient to take £1000 worth of tea than £1000 in money, I think it would be a monstrous proposition to say that they were not authorized to take anything but money for the payment of these shares, and if they chose to keep the tea by them till it became rotten and valueless, then the official liquidator might as well have said there was no power to take anything but money: 'You gave tea; they ought not to have taken tea; true it is that the tea was kept till it was rotten and of no use,

Resulting from the sale being, as properly defined, a *contract* or *agreement* between the parties thereto, the general law of contracts as far as applicable to sales applies. Hence, at common law, it is of the essence of a sale that there be (1) Parties to the sale competent to contract; (2) The mutual assent of such parties to the terms of the sale; (3) A lawful subject-matter of sale; and (4) A legal consideration for the sale which, as we have seen, may be either (a) money; (b) the representatives of money, as an order or promise to pay money, contained in a draft, bill of exchange, check, bond, promissory note, or due bill; or (c) labor, or specific articles of goods, or stock. The transaction amounts in the cases where the payment is in something else than money in its strictly technical sense, to a double sale, both of the parties being sellers and buyers; the subject of such sales being the personal property sold, on the one hand, and the bill of exchange, etc., or the stock, or the specific articles, received as an equivalent, on the other.¹

but nevertheless, although we induced you to give us tea, you must now pay £1000 as if we had taken nothing whatever.' In this case they were at liberty to take money or money's worth. The bonds were money's worth, and things which they could have turned into money any day they thought fit. It suited their convenience to take the money's worth, and having done so, by that transaction in my opinion they are completely bound. I cannot imagine a more unconscionable claim, and I should never have allowed it to be brought forward if I had been appealed to. I am perfectly satisfied upon the evidence it was the intention of all parties to conclude the transaction, as the documents show, by handing over the shares as actual payment and not by way of security. It is a payment which they were on their side at liberty to accept, and having been accepted in the conclusive manner which I have stated, the transaction was thereby

concluded, and therefore Baron Schroder's name must be taken off the list of contributories."

A transaction between the company and a shareholder, not literally amounting to payment in cash, was treated as such in *In re Paragnassa Steam Tramway Company*, Adamson's Case, L. R. 18 Eq. 670. And see Bush's Case, L. R. 9 Ch. 554; Terrao's Case, L. R. 9 Ch. 355; Drummond's Case, L. R. 4 Ch. 772; Pell's Case, L. R. 5 Ch. 11; *In re Baglan Hall Colliery Co.*, L. R. 5 Ch. 352; Vice Chancellor Malins' judgment in note.

¹ Every case of set-off is in principle a double sale or barter; no money, which is the mere representative of value, being paid in either case; the goods on the one side being set off against the goods on the other, making that kind of transaction referred to in Salkeld (see *ante*), in which each of the parties is a seller and each a buyer.

BOOK I.

PART II.

GIFTS DISTINGUISHED.

If there be no consideration, the transaction is not a sale, but a gift, which, although a contract, and when executed passes at common law all the rights as to ownership that would vest in a transferee under a sale, yet when the gift is merely by parol, having no consideration to support it, so long as it remains executory and no delivery of the subject of the gift has been made, the contract of gift cannot be enforced, except in such cases as where the language used amounts to a declaration of trust.¹

Gifts, besides being divided into executory and executed gifts, to which we have referred, are also divided into gifts *inter vivos* and gifts *mortis causâ*. Owing to the loose language of some of the cases and text-books² with reference to gifts *mortis causâ*, a

¹ Grant v. Grant, 34 Beav. 623; Mews v. Mews, 15 Beav. 529; Lucas v. Lucas, 1 Atk. 270; Richardson v. Richardson, L. R. 3 Eq. 686; Kekewich v. Manning, 1 De G. M. & G. 176; Parnell v. Hingston, 3 Sm. & Giff. 337; Morgan v. Malleison, L. R. 10 Eq. 475; Baddeley v. Baddeley, 9 Ch. Div. 113. But see Wariner v. Rogers, L. R. 16 Eq. 340; Richards v. Delbridge, L. R. 18 Eq. 11; Moore v. Moore, *ib.* 474; Heartley v. Nicholson, L. R. 19 Eq. 233; *In re Breton's Estate*, 17 Ch. Div. 416. For the general law relating to gifts, see Ward v. Audland, 16 M. & W. 862; Dunn v. Thornton, 1 C. B. 379, 381; Irons v. Smallpiece, 2 B. & Ald. 558; 2 Wms. Saund. 47 a; Shower v. Pilch, 4 Ex. 478; Douglas v. Douglas, 22 L. T. N. s. 127; Bromley v. Brunton, L. R. 6 Eq. 275; Jones v. Lock, L. R. 1 Ch. 25; *In re Beak's Estate*, L. R. 13 Eq. 489; Rolls v. Pearce, 5 Ch. Div. 430; Noble v. Smith, 2 Johns. 52; Adams v. Hayes, 2 Ired. L. 366; Sims v. Sims, 2 Ala. 117; Allen v. Polerecky, 31 Me. 338; Withers v. Weaver, 10 Barr. 391; Dole v. Lincoln, 31 Me. 422; Carpenter v. Dodge, 20 Vt. 595; Huntington v. Gilmore, 14 Barb. 243; Hunter v. Hunter, 19 Barb.

631; Brown v. Brown, 23 Barb. 565; Hitch v. Davis, 3 Md. Ch. 266; People v. Johnson, 14 Ill. 342; Craig v. Kittredge, 46 N. H. 57; Irish v. Nutting, 47 Barb. 37. In Bromley v. Brunton (*supra*), a cheque was given by A. to B. and presented without delay. The bankers had sufficient assets of A., but refused payment because they doubted the signature. The next day A. died, the cheque not having been paid; it was held that there had been a complete gift, *inter vivos*, of the amount of the cheque. See also Edwards v. Jones, 1 My. & Cr. 226; Jones v. Lock, L. R. 1 Ch. 25; Carringham v. Plunkett, 2 Y. & C. 245; Kiddill v. Farnell, 3 Sm. & Giff. 428; Cross v. Sprigg, 6 Hare, 552; Foley v. Hill, 2 H. L. Cas. 28; Tate v. Hilbert, 2 Ves. 111; Fletcher v. Fletcher, 4 Hare, 67; Bridge v. Bridge, 16 Beav. 315; Beech v. Keep, 18 Beav. 285; Tate v. Leithhead, Kay, 658; Hewitt v. Kaye, L. R. 6 Eq. 198; Bouts v. Ellis, 17 Beav. 121; 4 De G. M. & G. 249; Woodford v. Charney, 28 Beav. 96; Lawson v. Lawson, 1 P. Wms. 441; *Ex parte* Pye, 18 Ves. 140.

² See 2 Blk. Com. 514; 1 Wms. on Exrs., 687, and authorities there cited.

misimpression has been produced as to the essentials of a *donatio mortis causâ*, particularly with reference to the state or condition of the donor's health at the time of making the gift. So many of such gifts have been made during illness, that the mistake has been made that a "last sickness" is one of the essential ingredients of such a gift. But this view is entirely unwarranted. The very etymology of the term makes this clear: *donatio mortis causâ*, — a gift in prospect or contemplation of death. Thus Kent¹ says of such gifts: "It is essential to them that the donor make them in his last illness, or in contemplation and expectation of death." So in White and Tudor's note to *Ward v. Turner*,² it is laid down that "the gift must be made *in contemplation of the conceived approach of death*;³ otherwise it will not be a good *donatio mortis causâ*."⁴ "But a gift will be presumed to be in contemplation of death where the donor is 'in his last sickness' or 'languishing on his death-bed.'"⁵

With these views we entirely concur; and therefore, within this principle, a gift "in contemplation of death," from whatever cause, providing it is one of imminent peril, would be valid as a gift *mortis causâ*, if made for the purpose of being engaged in battle, by one "going to the front;"⁶ or by one proposing to commit suicide, if the intention is then carried out;⁷ or by one incurring the imminent danger of death in any other way, voluntarily or involuntarily.

Thus on the clearest principle involved in the matter, if one is about to jump over Niagara Falls to test his ability to do so safely; or to descend into a coal-pit at the imminent risk of his life to save the lives of others; or to stick to a sinking ship in order to make room for another in a boat; and make a gift in the prospect or expectation of death, the gift is clearly as valid a *donatio mortis causâ* as though made on a sick bed in contemplation of

¹ 2 Kent's Com. 444.

² 1 Lead. Cas. in Eq. 583, 659.

³ Duffield v. Elwes, 1 Bligh, N. S. 530; Edwards v. Jones, 1 My. & Cr. 233, 236.

⁴ Hedges v. Hedges, Prec. Ch. 269; Walter v. Hodge, 2 Swanst. 92, 100.

⁵ Miller v. Miller, 3 P. Wms. 356; Lawson v. Lawson, 1 P. Wms. 441; Walter v. Hodge, 2 Swanst. 100.

⁶ See Virgin v. Gaither, 42 Ill. 39, for a conditional gift, not strictly a *donatio mortis causâ*, but closely akin to it.

⁷ The reverse was held in a badly decided case in the Province of New Brunswick, Earle v. Botsford, 23 N. B. R. 407, in which that court give this extraordinary reason for their decision: "The deceased may have contemplated his death when he made the alleged gift, but he

contemplated it, not as the result of any circumstances of peril, actual or conceived, but as resulting from a contemplated act of self-destruction. *In such case there was no peril to his life.*" [This is, certainly, extraordinary reasoning!] "The conceived approach of death (so far as it might arise from what was contemplated) was entirely within his own control, and he escaped from the peril (and so the condition of the gift failed), every moment that he refrained from the act of destruction." And the note quoted by us above from White and Tudor is actually quoted as the authority for this extraordinary reasoning! It is only just to observe that but three of the junior members of the court took part in the judgment.

death; and in either of such cases, if the death should not result from the impending peril, the gift would be accompanied by another essence of such gifts, that it would be revocable on the condition not being performed.

As will thus be noticed, the essential distinction in the branch of the law we are here more immediately considering, between a gift *inter vivos* and a gift *mortis causâ* is, that in the former, the gift is generally absolute unless the condition is expressed; whereas, in the case of a gift *mortis causâ*, though the conditions on which the gift is made be not expressed, it is *always implied* that the gift is not to be absolute if the donor escape the apprehended peril; whether that *apprehended death* be from sickness or any other cause. A gift *inter vivos* may have a condition expressed, that it is only to become absolute in a certain case. Such a conditional gift *inter vivos* differs only from a gift *mortis causâ* in that, in the latter case, the condition is always implied, though it be not expressed. This, notwithstanding the mystery that is thrown about the subject, and the gross ignorance which prevails with reference to it (as is shown, for instance, in the New Brunswick case of *Earle v. Botsford*),¹ is simply the essential distinction between a conditional gift *inter vivos*, and a *donatio mortis causâ*.

The case of *Virgin v. Gaither*,² to which we have above referred, and which is usually incorrectly cited as holding that a gift made by the donor, who had enlisted for three years for the war, and was about to start to the front, is a good *donatio mortis causâ*, is a good illustration, not of a gift *mortis causâ*, but of a conditional gift *inter vivos*.

The head note of the case is a fair summary of what the case holds, namely, that "a party may make a gift of his property in anticipation of danger or death, if it is not in fraud of his creditors." But in this case, the condition was expressed. Here, horses were left with the plaintiff with the condition expressed that if the donor "died, got killed, or never came back," they were to become the property of the donee. Here, the condition being expressed, and the expressed contingency having taken place, the court held that the absolute property vested in the donee. But if, under the circumstances, there had been a gift of the horses, and no condition expressed, the gift would have clearly been an absolute gift *inter vivos*; and (as there was no imminent peril of death merely from enlisting for the war) not a conditional gift *mortis causâ*, revocable in event of the donor not dying; not getting killed, and coming back. This, we think, clearly illustrates this distinction between gifts *inter vivos* and gifts *mortis causâ*.

¹ 23 N. B. R. 407.

² 42 Ill. 39.

In Pennsylvania under facts very similar to those in *Virgin v. Gaither*,¹ the gift was held invalid, as not made in contemplation of death; in expectation of death, or apprehension of death; and was, therefore, an abortive attempt to make a testamentary disposition by parol.²

We have nowhere, either in England or in this country, met with so masterly an exposition of the law on the subject of *donationes mortis causâ* as by Mr. Chief Justice Gibson of Pennsylvania, in *Nicholas v. Adams*,³ which so exactly meets our view of the law on the question (which has been involved in confusion and doubt from the loose expressions of courts and text-writers, in the most unwarranted manner), that we quote at length from his very able and conclusive judgment. He says:—

“Perhaps the best definition of this species of donation in the books of the civil law, and the one which best corresponds to the best impressions the subject has received from the Anglo-Saxon jurists, who seem to be returning to the point from which they started, is that which is found in Justinian’s Institutes, Lib. 2, tit. 7: ‘*Mortis causâ donatio est, quod propter mortis fit suspicionem, cum quis ita donat, ut si quid humanitas ei contigisset, haberet is qui accepit; sin autem supervixisset, is qui donavit reciperet, vel si eum donationis penituisse aut prior decesseret, is cui donatum sit.*’

“Not a word in any part of this about sickness, first or last. Contested death-bed donations are of such occurrence in the courts as to have superseded all others, and to have grown in the apprehension of the judges from a species to a genus; and hence the notion that they are referable exclusively to death-bed sickness. If made in sickness, it must necessarily be the last sickness; for the contingency happens adversely to the donee, where the donor is restored to health. But this notion seems to be yielding to more comprehensive principles.

“In his treatise on Legacies, p. 26, Mr. Roper, whose accuracy as a text-writer is creditable to him, says it is necessary that the gift be made in peril of death, *or during the donor’s last illness*, and to take effect only in case he die. This would be critically correct were it not redundant in one particular, and too narrow in another; redundant, because it is indifferent whether the peril of death be induced by sickness *or any other cause*. Thus, the peril past, the gift of a soldier or malefactor might be retracted, though made in perfect health, when going to execution or to battle. But his position is also too narrow in one particular; *for a ground-*

¹ 42 Ill. 39.

² *Gourley v. Linsenbigler*, 51 Pa. 345.
And see *Mitchell v. Smith*, 33 L. J. Ch.

596; *Smith v. Dorsey*, 38 Ind. 451; *Irish v. Nutting*, 47 Barb. 370.

³ 2 Whart. 17, 21.

less apprehension of death is necessarily as operative to make a gift conditional, as if the danger were real. No one would hesitate to say that the gift of a man in the predicament of Parolles, when sportively doomed by his friends, in the guise of ferocious enemies, might be recalled. I would therefore briefly define a *donatio causâ mortis* to be a conditional gift dependent on the contingency of expected death.¹

"There may, doubtless, be a conditional gift when death is not expected; but in that case the condition would have to be expressed, and the contingency specified; in the *donatio causâ mortis* both are implied from the occasion."

The New Brunswick case is badly reported; but it is obvious that *Nicholas v. Adams* was cited in the case, leaving, therefore, the decision of that court in *Earle v. Botsford*² still more indefensible than it otherwise would have been.

Bracton, too,³ also quotes from the Institutes, and states that the gift is liable to be defeated by the donor's recovery, *or escape from the danger he apprehended himself to be in*, and agrees with the Digest,⁴ that "a donation of this kind may be made *in periculo mortis, not only from sickness, but from whatsoever other cause.*"

So Bacon defines it:⁵ "A *donatio mortis causâ* is a gift made by a man during his last illness, *or in peril of death*, but which is revocable during the donor's life, and is only intended to be absolute in case of the donee's surviving."⁶

¹ This definition, while in some respects an improvement on that of Roper, is itself defective; well illustrating the truth of the axiom that "definitions are dangerous things." While it is clear, as we have contended, that the contingency of expected death from whatever *impending* cause, whether of illness or other peril, brings the case within the rule as to gifts *mortis causâ*, it must be not the contingency arising from the general apprehension or expectation of death common to all, to take place at some period, which will cause the implied condition of a *donatio mortis causâ* to arise. But the expectation of death must be from some imminent, impending, or threatening cause. So, too, the charge of redundancy, to which Mr. Roper's definition is certainly open, and to which Chief Justice Gibson excepts, might, perhaps, be well suggested with reference to the learned chief justice's own definition. If the gift is "dependent on the contingency of expected death," it is, of course, necessarily "conditional." Without at all intimating that the following is without the "danger" incident to definitions, this would seem better to meet the very able reasoning of Chief Justice

Gibson himself, as well as to cover the whole range of well-decided cases on the subject:—A *donatio mortis causâ* is a gift of personal property dependent on the contingency of death from some imminent, impending, or threatening cause.

² 23 N. B. R. 407.

³ Lib. ii. c. 26.

⁴ L. 39, tit. 6, ll. 3, 4, 5, 6.

⁵ Bac. Ab. tit. *Legacies*, p. 162.

⁶ See also *Snellgrave v. Bailey*, 3 Atk. 214; *Hill v. Chapman*, 2 Bro. C. C. 612; *Walter v. Hodge*, 2 Swanst. 97; *Rankin v. Waguelin*, 27 Beav. 309; *Smith v. Smith*, 2 Str. 955; *Bunn v. Markman*, 7 Taunt. 224. In *Cosnahan v. Grice*, 15 Moo. P. C. 215, 222, Lord Chelmsford, in delivering the judgment of the Privy Council, said: "No question arises in this case as to the law upon the subject of donations *mortis causâ*. It is agreed that, in order to constitute a good gift to the respondent of the money in question, it must have been given in contemplation of death by Mrs. Evans, of which the fact of her being at the time upon her death-bed must be taken to be sufficient proof."

The *donatio* is simply a conditional gift made in contemplation of death by whatever cause, whether an existing disaster or an impending peril; and if there be a failure of the condition, by this expectation of death not being realized, the gift is revoked. It is, therefore, manifestly immaterial what mode of death is contemplated; the failure of the contemplated death is, *per se*, a failure of the implied condition, and works a revocation of the gift.

This is simply, notwithstanding the contradictions and confusion of some of the cases and text-books, all that a *donatio mortis causâ* amounts to. Thus further, in *Dickeschied v. Exchange Bank*,¹ the court say: "It is well-settled law, that without apprehension of death from some present illness *or impending peril*, and death actually resulting from such illness or impending peril, no gift *causâ mortis* can be created."

The donor must part with all dominion over the property, so that no further act of him or of his personal representative is necessary to vest the title perfectly in the donee; to belong to him presently as his own property in case the owner should die of his present illness, *or from the impending peril*, during the lifetime of the donee, and without making any change in relation to the gift.²

In *Baskett v. Hassell*,³ Mr. Justice Matthews, delivering the judgment of the Supreme Court of the United States, says: "A *donatio mortis causâ* must be completely executed, precisely as required in the case of gifts *inter vivos*, subject to be divested by the happening of any of the conditions subsequent, that is, upon actual revocation by the donor, *or by the donor's surviving the apprehended peril*, or outliving the donee, or by the occurrence of a deficiency of assets necessary to pay the debts of the deceased donor. These conditions are the only qualifications that distinguish gifts *mortis causâ* and *inter vivos*."⁴

We think it clear that the rule of the common law, as of the civil law, is as laid down by Justinian, which is quoted approvingly by Lord Chancellor Loughborough in *Tate v. Hilbert*;⁵ and that the language of some of the old English cases, and of some of the text-books, that the gift can only be made "during a last illness," cannot be sustained.⁶

In *Williams v. Guile*,⁷ (A. D. 1889), a gift of a policy of insur-

¹ 28 W. Va. 340, 367.

² *Borneman v. Siddenger*, 15 Me. 429; *Wells v. Tucker*, 3 Binn. 366; *Cartant v. Schuyler*, 1 Paige, 316; *Grimes v. Howe*, 49 N. Y. 17; *Dole v. Lincoln*, 31 Me. 422; *Richardson v. Adams*, 10 Yerg. 273; *Sims v. Walker*, 5 Humph. 503; *Gass v. Simpson*, 4 Cold. (Tenn.) 288; *Clough v. Clough*, 117 Mass. 83.

³ 107 U. S. 602, 615.

⁴ See, also, 1 Story's Eq. Jur. 607.

⁵ 2 Ves. Jr. 111.

⁶ In Louisiana, a *donatio mortis causâ* can only be made by a will and testament, and takes effect when the donor ceases to exist. *Johnson v. Waters*, 111 U. S. 640.

⁷ 2 N. Y. St. Rep. 251.

ance, made by the donor about six weeks before his death, was sustained by the New York Court of Appeals, affirming the judgment of the Supreme Court. The donor had had two strokes of paralysis previously; but he looked well at the time of the transaction, and about six weeks afterward he had a third attack of paralysis, with which he lingered for a few days and died. The gift was sustained as a good gift *donatio mortis causâ*. So in *Grymes v. Hare*,¹ a gift made five months before the donor's death took place, was sustained as a gift *mortis causâ*; the donor having continued ill from the time he made the gift (although not then *in extremis*) until the time of his death. The court held that the gift must be made *with a view to the donor's death*, and that *he must die of that ailment or apprehended peril*.

But in *Weston v. Hight*,² where the donor was ill of consumption and expected to live but a little while when he made the gift, and afterwards got better and attended to his business, until, some nine months afterward, he was taken sick again so as to be confined to his house, and soon after died; it was held that the donor's recovery subsequent to the gift vacated it, as his death was not from the existing illness or apprehended peril in contemplation of which he had made the gift.

In *Rankin v. Weguelin*,³ the donor, "being under the apprehension of death," gave the defendant, a fortnight before his death, bills of exchange. It does not appear from the case that at the time the donor was ill. The gift was sustained as a *donatio mortis causâ*. In *Jones v. Selby*,⁴ a gift was held by the Master of the Rolls to be a good gift *mortis causâ*, which was made three years before the donor's death. The decree was reversed, but only on the ground that there was no proof that a tally on the government for £500, which was the matter in dispute, was among the gifts made to the plaintiff in the suit. So, in *Hill v. Chapman*,⁵ a gift was sustained as a *donatio causâ mortis*, which was given to the defendant long before the donor's death; it not appearing in the case that, at the time, the donor was ill. And in *Snellgrove v. Baily*,⁶ where, the illness of the donor not appearing by the case, a gift of a bond for £100 to the defendant, the donor saying, with reference to the gift, "In case I die, it is yours; and then you will have something;" the gift was held by Lord Chancellor Hardwicke to be a good *donatio causâ mortis*.

In *Blount v. Burrow*,⁷ too,⁸ the effect of the holding is that such

¹ 49 N. Y. 17.

² 17 Me. 287.

³ 27 Beav. 309.

⁴ Prec. in Ch. 300.

⁵ 2 Bro. C. C. 612.

⁶ 3 Atk. 214.

⁷ 4 Bro. C. C. 71.

⁸ See p. 76.

a gift, made twelve days before death, without any allegation of illness at the time the gift was made, may be sustained as having been made in contemplation of death. *Smith v. Smith*¹ shows a similar absence of any statement of illness at the time of the making of a gift, which was sustained as a good gift *mortis causâ*.

In *Edwards v. Jones*,² the gift failed as a *donatio mortis causâ*, because the court held that, among other causes, the donor was not in such a state of illness, or *expectation of death*, as would warrant a supposition that the gift was made *in contemplation of that event*. And in the old case of *Duffield v. Elwes*,³ it was, in equivalent language, laid down by Lord Eldon, that nothing could be "more clear than that this *donatio mortis causâ* must be a gift made by a donor *in contemplation of the conceived approach of death*." So Burns' definition is: "*Donatio causâ mortis*, or a gift in prospect of death, is where a man, moved with the consideration of his mortality, doth give and deliver something to another, to be his in case the giver die, but if he lives he is to have it again."⁴

But while it is manifest that some of these old English cases cannot be sustained, where the gifts do not seem to have been made in what, within the rule as to *donationes mortis causâ*, is an apprehension of death; on the other hand, the text-writers who have laid down the rule, in effect, that the contemplation of death must be that "*from an existing disorder*," or "if a gift be not made by the donor in peril of death, *i. e.*, *with relation to his decease by illness affecting him at the time of the gift*, it cannot be supported as a donation *mortis causâ*,"⁵ is, as we have shown, equally as wrong in the opposite direction.

This citation from Williams is the authority which misled the junior members of the New Brunswick court, in the unsound decision of *Earle v. Botsford*,⁶ to which we have previously referred.

But, in the note to Williams,⁷ it is said, "*In Blount v. Burrow*, as reported in 1 Ves. Jr., 546, Eyre, C. B., seems to be of the opinion that there must be positive evidence that the gift was made *in the last illness*; but this *dictum* is not found in the report of the case in 4 Bro. Ch. Cas., 72, and does not seem supported by any other authorities." In *Edwards v. Jones*,⁸ however, it is said by Vice-Chancellor Shadwell, that "It is of the essence of a *donatio mortis causâ* that the gift shall be proved to have been made in contemplation of the donor shortly terminating life *by reason of extreme sickness or extreme old age*." But this was but an *obiter dictum*, and unquestionably is not law by the civil law,

¹ 2 Str. 955.

² 1 Myl. & Cr. 226, 236.

³ 1 Bli. N. s. 497, 530.

⁴ 4 Burns' Ec. L. 110.

⁵ 1 Wms. on Ex'rs, 771, 7th ed.

⁶ 23 N. B. R. 407.

⁷ Note r. to 1 Wms. on Ex'rs, 771.

⁸ 7 Sim. 325.

nor, as derived from the civil law, by the common law either. We examine some additional authorities on the subject.

In *Ward v. Turner*,¹ where Lord Hardwicke treats the gift as one made "in prospect of death,"² not necessarily from illness, he says, with reference to the characteristics of the gift: "It is not on a general apprehension of approaching mortality, but when the particular recovery of the donor is annexed by way of defeasance to the gift, which would be otherwise absolute. It may be confined to an immediate illness [meaning here, clearly, where the apprehension of death is from illness]; but the Roman law puts the case of a man's going a journey, which was formerly more hazardous than now: so if going to battle, and in case he is killed, and makes that gift: so if under bad state of health he makes a complete gift, if he does not recover; that must mean *some circumscribed time or illness*, and there must be some sort of defeasance arising *from the recovery or return home*, to these donations; otherwise it is an absolute gift."

The effect of this is, that the gift is not good *mortis causâ* if given in general expectation of death from mortality, but it must be made under an apprehension of death from some particular imminent cause, whether that be illness or any other cause, in order that the conditions of a gift *mortis causâ* may arise.

The civil law went further than the common law. Under the civil law, a man might be in good health and in no immediate apprehension of death, but he might be placed in a situation, or about to embark in an undertaking, calculated to remind him of his mortality. He might be preparing for a long journey or voyage; he might have to pass through a country notoriously beset by robbers; he might have private enemies or powerful oppressors to cope with; and under these or similar circumstances, he might be desirous of making a conditional gift of his property, to take effect in favor of friend or relative in case of his premature decease, and subject to resumption if he should escape the contemplated danger. Such gifts, under the civil law, were called *donationes mortis causâ*.³

With us, there being no immediate apprehension of death, these would be conditional gifts *inter vivos*, or absolutely void as attempted testamentary dispositions.⁴

¹ 2 Ves. Sr. 431, 435.

² See p. 433.

³ See Dig. Lib. 39, tit. 6, ll. 3 & 4.

⁴ As in the case where Justinian, in the Institutes, lib. 2, tit. 7, as a *donatio mortis causâ*, quotes from the 17th book of the Odyssey, the case of Telemachus, who, contemplating the possibility of his falling a victim to the hostility of the suitors of

Penelope, though at the same time expressing a resolution to defeat the designs of his enemies and destroy the suitors, if he could, makes a conditional gift of his patrimony to his friend Piraus, in the following lines, thus rendered by Cowper: —

"Piraus, wait; for I foresee not yet
The upshot. Should these haughty ones
effect

In *Walter v. Hodge*,¹ Sir Thomas Plumer, M. R., says: "Nor is it necessary that the donation should be in the last illness. It is sufficient *if made in contemplation of death*, and on the conditions stated." In *Tate v. Hilbert*,² the definition of a gift *mortis causâ* by the civil law is recognized by Lord Loughborough; *i. e.*, where a person *being in peril of death* gives something, but not so that it shall presently be his that received it, but in case the giver dies; and the definition of Justinian,³ as quoted by Chief Justice Gibson, in *Nicholas v. Adams*,⁴ was held to be a clear and correct definition of a gift *mortis causâ*.

So, in *Parish v. Stone*,⁵ Chief Justice Shaw accurately states the law thus: "It is now well settled, that under certain limitations a gift may be made by one *in present contemplation of death*, of money or other property capable of passing by delivery; that to give effect to such a donation there must be a clear and manifest intention of the owner to give a subject capable of passing by delivery, and an actual delivery at the time, *in contemplation of death*; that such a gift is inchoate and does not become perfect till the death of the donor; that it is revocable by the donor during his life, *and if he recovers from the sickness or other cause of apprehended death*, under which the donation is made, the gift is void. But where there is such a gift and actual delivery, and the expected death of the donor ensues, the gift is complete, and vests the property in the donee, presently, without its vesting in or passing through the executor or administrator, and it is liable to be divested only in favor of the creditors of the owner."

Sessions v. Mosely,⁶ is to the same effect. And in a more recent case in the same court, the ruling of a judge was sustained to the effect that to establish a *donatio causâ mortis*, there must be shown a clear and manifest intention on the part of the owner of the property to make the gift; a subject capable of passing by delivery, and an actual delivery at the time *in contemplation of impending death*; that where there is such a gift and actual delivery, and the expected death of the donor ensues, the gift is complete, and vests the property in the donee presently, without it vesting in or passing through the executor or administrator."⁷

In an article in 21 Am. Law Rev., at p. 740 (A. D. 1887), the

My death, clandestine, under my own roof,
And parcel my inheritance by lot,
I rather wish these treasures thine, than
theirs;
But should I with success plan for them all
A bloody death, then, wing'd with joy, thy-
self
Bring home these presents to thy joyful
friend."

¹ 2 Swanst. 92, 100.

² 2 Ves. Jr. 111, 119, 120.

³ Institutes, Lib. 2, tit. 7, *De Donationibus*.

⁴ 2 Whart. 17, 21, stated *ante*, reversing the judgment of the majority of the court in s. c., 1 Miles (Pa.), 90, which sustained a direction to the jury that a *donatio causâ mortis* must be made during a *last illness*.

⁵ 14 Pick. 193, 203.

⁶ 4 Cush. 87, 91, *et seq.*

⁷ *Clough v. Clough*, 117 Mass. 83.

law is well stated: "The first requisite necessary to constitute a valid *donatio causâ mortis* is that it must be made in peril of death.¹ This necessity that the gift should be made in contemplation of death, is sufficiently obvious from the very title of the gift, *causâ mortis*, — for the *cause* of death; in consideration of death; on account of or in anticipation of death. The gift must be made while the donor is under the apprehension, fear, suspicion, or expectation of death, near at hand.² A vague and general impression that death may occur from those casualties which attend all human affairs, but which are still too remote and uncertain to be regarded as objects of present contemplation and apprehended danger, is not sufficient. Nor that the donor be 'moved by the general consideration of man's mortality,' as is usually the incentive which induces men to make wills; but he must be under some special and peculiar danger at the time.³ The gift is presumed to be in contemplation of death where the donor is 'in his last sickness,' or 'languishing on his death-bed.'⁴ It is not, however, necessary that the donor should be really suffering from some disease. *If he is in danger of death from any other cause it will be sufficient.*"⁵

It was contended, in *Dexheimer v. Gautier*,⁶ that a gift of bounty money, made and delivered by an able-bodied man to the appellant, at the time of the donor's enlistment into the United

Williams, J., says, in Walsh's Appeal, 122 Pa. 177, 187: "All gifts are necessarily *inter vivos*, for a living donor and donee are indispensable to a valid donation; but when the deed is prompted by the belief of the donor that his death is impending, and is made as a provision for the donee, if death ensues, it is distinguished from the ordinary gift *inter vivos*, and is called *donatio mortis causâ*."

¹ Duffield v. Elwes, 1 Bligh, N. S. 530; Knott v. Hagan, 4 Met. (Ky.) 99; Champney v. Blanchard, 39 N. Y. 111; Edwards v. Jones, 1 My. & Cr. 233, 236; Walker v. Hodge, 2 Swanst. 97, 100.

² Gourley v. Linsensbigler, 51 Pa. 345; Weston v. Hight, 17 Me. 287; Irish v. Nutting, 47 Barb. 370; Thompson v. Thompson, 12 Tex. 327.

³ Dexheimer v. Gautier, 34 How. (N. Y.) 472; Smith v. Dorsey, 38 Ind. 451, and other cases above cited.

⁴ Miller v. Miller, 3 P. Wms. 356; Walter v. Hodge, 2 Swanst. 100.

⁵ With the whole of the above we entirely concur. See also Wells v. Tucker, 3 Binn. 370, per Tilghman, C. J.; Michener v. Dale, 23 Pa. St. 59, 63; Grymes v. Hone, 49 N. Y. 17, 20. In Irish v. Nutting, 47 Barb. 370, 386, 387, after re-

ferring to the statement in some of the authorities that a gift *mortis causâ* can only be made during a last illness, the court say, Bacon, J. delivering the judgment: "The modification of this rule, as I have suggested, relates mainly to the nearness of the approach of death, and I think there will be no case found where such a gift is upheld, in which there was not either *peril of death from some cause imminent and impending, or the conceived near approach of natural death*. It is not indeed necessary that the party should be *in extremis*, according to some of the earlier cases, but the gift will be presumed to be in contemplation of death, when the donor is on his death-bed, or languishing in what proves to be his last illness. . . . A vague and general impression that death may occur from those casualties which attend all human affairs, but which are still too remote and uncertain to be regarded as objects of present contemplation and apprehended danger, is not sufficient to sustain such a gift. The party must be in a condition to fear approaching death *from a proximate and impending peril, or from illness preceding expected dissolution.*"

⁶ 34 How. Pr. (N. Y.) 472.

States Army in 1864, after he had successfully passed the examination made by the surgeon with regard to his health and fitness, was a gift *mortis causâ*. The appellant's answer rested solely on the claim that it was such a gift. The majority of the court held (Barbour, J., dissenting, who held that the gift was good, *mortis causâ*) that the gift alleged in the answer was an absolute one, or void. Chief Justice Robertson, who delivered the judgment of the majority (himself and Garvin, J.), said: "Death by any casualty at any time did not render it a *donatio mortis causâ*, because it was inevitable. No case is to be found of a *donatio mortis causâ* unless by some imminent peril, and when that has passed away the giver has a right to revoke it. It is immaterial whether such a gift be a conditional one, dependent upon the escape of the donor from impending peril, or a revocable one, dependent upon his death thereby, without any revocation, or whether the peril be confined to sickness or may include the dangers of travelling, navigation, or battle."

The majority of the court did not differ with Barbour, J., as to the principle which we are considering, of a *donatio mortis causâ*; the difference between them being as to the application of the principle to the facts as alleged and as proved in the case. Thus, after showing by the authorities that the definition of Blackstone, which is substantially that too of Williams on Executors, which misled the junior members of the New Brunswick Court in *Earle v. Botsford*,¹ is too narrow, in so far as it confines this species of gift to cases of last illness; it being sufficient if the apprehension of death arises from other causes, as from infirmity, old age, or any external or anticipated danger, Barbour, J., says:—

"If then, a gift is [not?] void as a *donatio mortis causâ*, when made in contemplation, expectation, consideration, apprehension, or prospect of death, arising from sickness, infirmity, old age, or any external or anticipated peril or danger, as seems to be fully established by the learned writers above mentioned, and the authorities cited by them, there can be no good reason why an enlisted soldier of the United States might not, under the circumstances detailed in the pleadings and admissions of the parties, have made such a gift of his bounty money to another as would constitute a good and complete donation *mortis causâ*. The obligation assumed by such soldier almost necessarily exposed his life to extraordinary perils and dangers."

The case of *Gass v. Simpson*² is a very similar case in principle to the Illinois case of *Virgin v. Gaither*,³ stated by us *supra*, and where, as there, the gift was sustained. But while in the

¹ 23 N. B. R. 407.² 44 Coldw. (Tenn.) 288.³ 42 Ill. 39.

Illinois case the gift is sustained as a good *conditional* gift; in the Tennessee case, it is expressly decided by the majority of the court (Milligan, J., dissenting), on the ground that the gift in question constituted a valid *donatio causâ mortis*.

If *Virgin v. Gaither*¹ is sustainable on the ground that the gift was a good conditional gift *inter vivos*, and we think it is, then the case of *Gass v. Simpson*² can also be sustained on the ground that the gift was a gift *inter vivos* on a valid condition, and took effect on the happening of the condition, without going the length of holding that the gift in question was a *donatio mortis causâ*.

In this case, as in the New York case of *Dexheimer v. Gautier*,³ the dissenting judge did not object to the exposition of the law as laid down by the majority of the court; but, as there, raised the question as to the application of those principles to the state of facts disclosed in the record.

In *Gass v. Simpson*,⁴ as in *Virgin v. Gaither*,⁵ the condition was expressed; and therefore, as in that case, the facts might well bring the gift in the Tennessee case within the "conditional gift" as distinguished from a gift *mortis causâ* (where the condition, though not expressed, is implied) by the majority of the court in their judgment, where they say: "Now, in case of a conditional gift, when death is not expected, the condition must be expressed, and the contingency upon which it is to take effect, specified. But in case of a gift *causâ mortis*, both the condition and the contingency are implied from the occasion, and need not be expressed or specified. Hence if the danger or peril be passed, or if made in sickness the donor recover from his illness, or if he resume the possession of the gift, it will be defeated."

In *Gass v. Simpson*,⁶ the facts were, that one C. was forced to leave his home in East Tennessee, in August, 1862, to avoid the operation of the Confederate conscription laws, and went to Kentucky, where he joined the Union army, and never returned, having died in Kentucky in 1863. On the day before he left, he delivered a sum of money, together with some notes, receipts, etc., to one of the respondents, to whom he stated that *if he never returned*, he wanted it all to be given to his son; and on the day he left, he repeated this statement. The administrator of C. filed his bill, claiming the money, etc.; and the bill being dismissed, appealed. In affirming the decree dismissing the bill, Hawkins, J., in delivering the judgment of the majority of the court, states very accurately the principles governing *donationes mortis causâ*; but we think, with the dissenting judge, Milligan, J., that the case in question

¹ 42 Ill. 39.

² 44 Coldw. 288.

³ 34 How. (N. Y.) 472.

⁴ 44 Coldw. 288, 297.

⁵ 42 Ill. 39.

⁶ 44 Coldw. 288.

was not a valid gift *mortis causâ*. With the statement of principles in the case we fully concur; as to their application to the facts we are more than doubtful. After a just reference to the “very learned and able opinion in the case of *Nicholas v. Adams*,”¹ of Chief Justice Gibson (which, as we have already intimated, is the ablest discussion of the question we have found in any of the common-law cases), and an examination of other authorities on the question, the following accurate exposition of the law is made:—

“After a review and careful analysis of all the authorities to which we have had access, we conclude that upon principle and in accordance with what seems to be the weight of authority, the essential requisites of a *donatio causâ mortis* are, that it being made during the sickness of the donor, or whilst under the belief that he is in peril of death, or surrounded by threatened dangers from which he has an immediate existing apprehension of death, and in contemplation of death from such sickness, peril, or danger, he is thereby moved to make the donation. But we do not mean by this that the donor must be *in extremis*, or moved by the apprehension of immediate death; but the apprehension itself must be immediate. A general apprehension of death from the mortality of man will not be sufficient, but it must be an apprehension arising from the particular sickness, peril, or danger.”

Unless such a case as *Jones v. Selby*,² where the gift was made by the donor, in apparently good health, three years before his death, and which, as “a gift *in presenti* to take effect *in futuro* after the party’s death,” was agreed to be a good *donatio causâ mortis*, and impliedly assented to by the Lord Chancellor as such, is law; and, in the light of principle and of the later authorities, we do not think it is; then we think that a gift by one who made it under no more direct or immediate apprehension of death than was done by the donor in *Gass v. Simpson*,³ in leaving one State to avoid conscription, and going into another State, where, subsequently, he joined the Federal army, and apparently died a natural death, is not made “under the belief that he was in peril of death, or surrounded by threatening dangers from which he had an immediate existing apprehension of death,” so as to make the gift a valid *donatio mortis causâ*. And while we think the law of *donationes mortis causâ* is correctly laid down in the case, which clearly would exclude from its operation such a case as *Jones v. Selby*,⁴ we think the dissenting opinion of Milligan, J., the better one,—that the rule laid down by the court was inapplicable to the state of facts disclosed in the record.

¹ 2 Whart. 17, 22.

² Prec. in Ch. 300.

³ 44 Coldw. 283.

⁴ Prec. in Ch. 300.

And now, while we think we have got to a correct conclusion as to what gifts *mortis causâ* are, and what they are not, some of these later cases suggest an examination of conditional gifts, which are sustainable as such, though they do not come within the class of *donationes mortis causâ*.

It is clear that where a gift of personal property is made by its owner, which is not in fraud of creditors, and the subject of the gift is delivered to the donee, the property in the chattel passes to the donee.¹ So, where personal property is given by its owner conditionally, on a condition which is not illegal, and the chattel is delivered to the donee, the property therein becomes absolute in the donee on the performance or happening of the condition.²

So, if A. give and deliver his watch to B., on his being about to take a trip to a foreign country, with the condition that if A. do not return within six months, then the watch is to become the absolute property of B.; on the happening of the condition, which was one that the donor had the right to impose, there is clearly no legal principle to prevent the property in the watch vesting in B. at the termination of the six months, if A. shall not have then returned. Precisely on the same principle, we think, if personal property be given and delivered by A. to B., on the former leaving the country, on the condition that the property shall belong absolutely to B. if A. should never return; as this, too, is a condition which A., with his gift, would have a legal right to impose; the title of B. in the property would not be divested until the happening of the condition upon which alone it would be defeated. There is no principle of common law opposed to this; nor do we think that this contravenes the statutes of wills, or makes it an attempt to make a testamentary disposition of the subject of the gift, simply because it is possible that the donor might return at any time prior to his death abroad, and that there would be no absolute certainty until such death that he would not return, and so, by returning, defeat the gift. Hence

¹ Faxon v. Durant, 9 Met. 339; Penfield v. Thayer, 2 E. D. Smith (N. Y.), 305; Millsbaugh v. Putnam, 16 Abb. Prac. 380; White v. Palmer, 1 McMull. Eq. (S. C.) 115; Pearl v. Hansborough, 9 Humph. (Tenn.) 426; Howard v. Windham County Bank, 40 Vt. 597; Bogan v. Finlay, 19 La. Ann. 94; Grover v. Grover, 24 Pick. 261; Sanborn v. Goodhue, 23 N. H. 48; Green v. Kornegay, 4 Jones, Law (N. C.), 66; Moultrie v. Jennings, 2 McMull. 508; 2 Bl. Com. 441; 4 Dane Ab. 123; Irons v. Smallpiece, 2 B. & Ald. 551; Wates v. Clifton, Rolle R. 61; Bunn v. Markham, 2 Marsh. 532; Ward

v. Turner, 2 Ves. 431; Shep. Touch., tit. Gift, 226; Reeves v. Capper, 5 Bing. N. C. 136; Shower v. Pilek, 4 Ex. 478; Bourne v. Fosbrooke, 18 C. B. N. S. 515; Douglas v. Douglas, 22 L. T. N. S. 127; Re Ridgway, 15 Q. B. Div. 447; Cochrane v. Moore, 25 Q. B. Div. 57.

² Martrick v. Linfield, 21 Pick. 325. And see on Conditions, Powell v. Forrest, 2 Wms. Saund. 138 and note; Co. Litt. 42, 206; 2 Bl. Com. 156, 157; 4 Kent's Com. 125; Mizell v. Burnett, 4 Jones (N. C.), 249; Duncan v. Self, 1 Murph. (N. C.), 466; Duclaud v. Rousseau, 2 La. Ann. 168.

we think it clear on principle, that if A. should die abroad without having returned, no title to the chattel would vest in A.'s executor or administrator.

As we have already intimated, we think that the holding in *Virgin v. Gaither*¹ can be sustained on precisely this principle, as there the gift was only liable to be defeated in event of the donor returning to the place he had left; and if he did not so return, the gift was to become absolute. We do not think that such a condition to prevent the gift becoming absolute, if exercised, would be at all illegal, because it might be exercised at any time during the life of A.

So, too, without straining the principle of a *donatio mortis causâ* unduly, so as, in order to sustain it, to bring *Gass v. Simpson*² within its purview, we think that that case, like *Virgin v. Gaither*,³ may be sustained on the same ground; as there, too, the gift was made by the donor to become absolute if he never returned, and he never did return.

While we think with Milligan, J., in *Gass v. Simpson*,⁴ that the principles governing gifts *mortis causâ* are not applicable to those cases, we perceive no reason why they are not sustainable as conditional gifts *inter vivos*. Thus in *Dexheimer v. Gautier*,⁵ stated *supra*, where the gift was bounty money, and was delivered by an able-bodied man to the appellant, at the time of the donor's enlistment into the army of the United States, in 1864, after having successfully passed the examination made by the surgeon with regard to his health and bodily fitness, and where the exclusive reliance was that it was a *donatio mortis causâ*, the gift having been made about the time the donor went to the war, and who was killed in the war; the majority of the court held, and we think, correctly, that the peril was not sufficiently imminent to make the gift a *donatio mortis causâ*; whatever else it might have been. If no condition was attached, it was a gift absolute *inter vivos*; and if a condition was expressed that did not by its nature make the transaction an attempt to make a parol testamentary disposition, then it would be simply a conditional gift *inter vivos*. And we think the court were perfectly correct in holding that the gift was not a *donatio mortis causâ*. From the statement of the case, the gift would seem to have been a simple absolute gift *inter vivos*. To hold that, in this case, where there was so little direct apprehension of death, there was a gift in contemplation of death, would be as great an error, on the one

¹ 42 Ill. 39.

² 4 Coldw. 288.

³ 42 Ill. 39.

⁴ 4 Coldw. 288, 300.

⁵ 34 How. Fr. 472.

hand, as was, on the other hand, committed by the junior judges of the New Brunswick Court, in *Earle v. Botsford*,¹ stated *supra*, in holding that that which was expressly admitted to have been a gift made in contemplation of death by suicide (almost immediately followed by that event) was not a gift made in contemplation of death!

But we are now driven to the investigation of a subject about which we had not thought until now that there could be the slightest question, viz., whether there can be a good conditional gift *inter vivos*. We intimated above that while *Virgin v. Gaither*² and *Gass v. Simpson*,³ in the light of the late authorities, could not be sustained on the ground that the gifts in those cases were *donationes mortis causâ*; yet that they might be sustained as valid conditional gifts, the condition upon which they were to become absolute having been performed, or the condition upon which they were to be defeated having failed. As there can be a good contract of sale conditionally, a good contract of bailment conditionally, we fail to perceive any reason why there may not be a good contract of gift conditionally. Each of the classes of contracts, as much as either of the others, comes within the definition of a contract, — an agreement between two or more parties to do or not to do some particular thing. The essential distinction between the executory contract or agreement of gift and any other executory agreement or contract is, that the former, being merely voluntary and having no consideration to support it, has with it a *locus pœnitentiæ*, and cannot be enforced; while other executory agreements or contracts, based on a valid consideration, are enforceable. All gifts, even including those of a strictly testamentary character, which latter are made *in præsentî* to take effect *in futuro*, are in one sense gifts *inter vivos*; the essential distinction between a gift *mortis causâ* and any other conditional gift being, we think, that in other gifts, generally, the condition must be expressed, or at least be implied from special circumstances connected with them; while in gifts *mortis causâ*, the special conditions attaching to them of power of revocation, and of only taking effect on death from the impending cause, are always implied when not expressed. These principles, which on principle we considered thoroughly well-established elementary principles, are however, we find, somewhat violently attacked in *Irish v. Nutting*,⁴ and more particularly in *Smith v. Dorsey*.⁵

The gift in the Indiana case of *Smith v. Dorsey*⁶ was quite as clear a conditional gift *inter vivos* as it was in the Tennessee case

¹ 23 N. B. R. 407.

² 42 Ill. 39.

³ 4 Coldw. 288.

⁴ 47 Barb. 370, 383 *et seq.*

⁵ 38 Ind. 451.

⁶ *Ibid.*

of *Gass v. Simpson*,¹ and was on one point less questionable than it was in the Illinois case of *Virgin v. Gaither*.² So if, in *Smith v. Dorsey*,³ the gift as a conditional gift *inter vivos* (for, as in the other cases, we think it cannot be sustained as a gift *mortis causâ*, there not having been the necessary contemplation of approaching imminent death) cannot be sustained, it is equally as clear that it cannot be in either of these other cases.

The gift of a gun was made by the donor in *Smith v. Dorsey*³ after he had entered the military service of the United States, and just prior to his joining the army. The gun was presented to the donee on the condition that if the donor did not return, the gun was to be the property of the defendant, the donee. The donor then left, leaving the gun with the defendant, and never returned, but died in the army; the cause of death not being stated. This, we think, with the Supreme Court of Indiana, was not a gift *mortis causâ*, any more than it was in either the Illinois case or in the Tennessee case alluded to above. In an action by the donor's administrator, for the gun, the court below found for the defendant, which was sustained by the court of Common Pleas; but on appeal to the Supreme Court of the State, the decision was reversed. The court reached the conclusion, as in *Dexheimer v. Gautier*,⁴ and *Irish v. Nutting*,⁵ that the gift was not good *mortis causâ*, because the decedent was at the time of the gift in good health, and had no cause to apprehend death from any impending danger or from material causes.

But in order to decide for the plaintiff, the court, as they had to do, went further, and held that the gift was not good *inter vivos*, because they held that there could not be, under the common law, a conditional gift. Buskirk, C. J., in delivering the opinion of the court, said: "To constitute a valid gift *inter vivos*, it is essential that the article given should be delivered *absolutely and unconditionally*. The gift must take effect at once and completely, and when it is made perfect and complete by delivery and acceptance, it then becomes irrevocable by the donor. Gifts *inter vivos* have no reference to the future, but go into immediate and absolute effect. A court of equity will not interfere and give effect to a gift that is inchoate and incomplete."

For these propositions, 1 Parsons on Contracts, 234; 2 Kent's Commentaries, 438; Bouvier, Law Dictionary, tit. GIFTS, *inter vivos*; *Bedell v. Carll*,⁶ *Irish v. Nutting*,⁷ and *Dexheimer v. Gautier*,⁸ are cited.

¹ 4 Coldw. 288.

² 42 Ill. 39.

³ 38 Ind. 451.

⁴ 34 How. Pr. 472.

⁵ 47 Barb. 370.

⁶ 33 N. Y. 581.

⁷ 47 Barb. 370.

⁸ 34 How. Pr. 472.

With one of these propositions we have no quarrel. That "a court of equity will not interfere and give effect to a gift that is inchoate and incomplete," is generally, though it also is not universally, true; as where the gift is in the nature of a trust.¹ But generally it is true.² But this simply means, as it says, that a court of equity will not interfere and give effect to a gift that *is inchoate and incomplete*. It does not say that a gift which has been made on condition, and where the condition has been performed, and which gift therefore is complete and not inchoate, is not a gift. All that it means is, where an ingredient is wanting to make the transaction a gift, a court of equity will not interfere to supply the ingredient, or to compel the inchoate donor or his executors or administrators to supply it. Thus if A. say to B., "I will give you my horse to-morrow," and does not give it, as delivery is the very essence of a gift unaffected by a trust, a court of equity will not enforce the inchoate gift and compel the delivery.

The other propositions, too, as far as they are correct, do not contravene the position that a conditional gift of personal property, *duly delivered*, as in *Smith v. Dorsey*,³ *Gass v. Simpson*,⁴ and in *Virgin v. Gaither*,⁵ takes effect "at once and completely," on the performance of the condition under which the personal property was given and delivered, and then becomes "absolutely and unconditionally" a gift "irrevocable by the donor;" going "into immediate and absolute effect" on the condition on which it is given being performed. The analogy to a conditional sale, as to the mode of vesting of the property, is entire.

Behind, and as the foundation of these propositions, is the following from Blackstone: "A true and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately; as if A. gives to B. £100 or a flock of sheep, and puts him in possession of them directly, it is then a gift executed in the donee, and it is not in the donor's power to retract it, though he did it without any consideration or recompense. . . . But if the gift does not take effect *by delivery of immediate possession*, it is then not properly a gift, but a contract [*i. e.*, an agreement to give]; and this a man cannot be compelled to perform, but upon good and sufficient consideration."⁶

¹ See *Jones v. Lock*, 1 L. R. Ch. 35; *Johnson v. Ball*, 5 De G. & Sm. 85; *Richardson v. Richardson*, 3 L. R. Eq. 686; *Bridge v. Bridge*, 16 Beav. 315; and cases cited *supra*.

² *Edwards v. Jones*, 7 Sim. 325; *Fletcher v. Fletcher*, 4 Hare, 78; *Weale v. Olive*, 17 Beav. 252; *Wycherley v. Wycherley*, 2 Eden, 177; *Brownsmith v. Gilbourne*, 2 Strange, 738; *Morris v.*

Burroughs, 1 Atk. 401; *Heartley v. Nicholson*, 23 W. Rep. 374; *James v. James*, 19 L. T. N. S. 809; *Autrobus v. Smith*, 12 Ves. 47.

³ 38 Ind. 451.

⁴ 4 Coldw. 288.

⁵ 42 Ill. 39.

⁶ 2 Blk. Com., by Chitty, 441, and note (5).

This simply is to the effect that to perfect a gift there must be a delivery of the subject-matter.¹ If on delivery the gift be absolute, "it takes effect immediately" on the delivery; if conditional, "it takes effect immediately" on the performance of the condition. The giving and the delivery unite to make the gift perfect; and where there are both of these, the absolute giving and the delivery; or the conditional giving; when, in this latter case, the performance of the condition and the delivery unite, the gift, in the one case as in the other, is complete.

Blackstone's position simply is that where the gift is only promised and not made, it is simply a *nudum pactum*,—a promise to give, and not a gift; and being without "good and sufficient consideration," cannot be enforced. He neither says nor implies that, in the case of a gift made on condition, with delivery of possession and the condition performed, the transaction is not a valid, executed gift.

So, too, 1 Parsons on Contracts,² as cited. Professor Parsons, virtually using the language of Blackstone, although citing no authority for the first proposition, says: "*It is essential to a gift that it goes into effect at once, and completely. If it regards the future, it is but a promise; and being a promise without consideration, it cannot be enforced, and has no legal validity. Hence delivery is essential to the validity of every gift; for not even a court of equity will interfere to enforce a merely intended or promised gift.*"

This does not mean, any more than Blackstone, that there cannot be a good conditional gift. All that it means is that there must be a delivery of the subject-matter, — that a promise to give is not a gift, and that a "merely intended or promised gift" will not be enforced. Thus, to be severely elementary, a promise to give, and no delivery, is no gift; a promise by A. to give B. his horse at C. to-morrow, passes nothing to B. without the delivery. A promise by A. to give B. his horse to-morrow if B. is at C., and no delivery, the gift "regards the future; it is but a promise," and, as "a merely intended or promised gift," will not be enforced. But if A. gives B. his horse, delivering the horse, and the horse is to become the property of B. to-morrow, if B. is then at C., and B. is then at C.; by the very terms of the gift, the condition has been performed, the gift "goes into effect at once and completely;" and the property in the horse is irrevocably in B.³

¹ See *Taylor v. Henry*, 48 Md. 550; *Northrop v. Hale*, 73 Mo. 66; *Dole v. Lincoln*, 31 Me. 422; *Robinson v. Ring*, 72 Me. 140; *Pierce v. Bank*, 129 Mass. 432; *Hill v. Stephenson*, 63 Me. 364; *Barker v. Frye*, 75 Me. 29; *Stephenson v. King*, 50 Am. Rep. 172; *Stevens v. Stevens*, 2 Hun, 470; *Carleton v. Lovejoy*, 54 Me. 446; *McGrath v. Reynolds*, 116 Mass. 566; *French v. Raymond*, 39 Vt. 623; *Headley v. Kirby*, 18 Pa. St. 326; *Savings Bank v. Fogg*, 82 Me. 538; *Drew v. Hagerty*, 81 Me. 231.

² Page 234.

³ See 2 Blk. Com., 154-157, on Conditions.

It will be noticed here that both Blackstone and Parsons refer not specially to what are distinguished as gifts *inter vivos*, but to gifts generally. Hence, it is palpable that they had no intention of saying or implying by their language, that any gift could not be made conditionally; as they both well knew that the very essence of one of the class of gifts to which they were referring, without any distinction in their language — a gift *mortis causâ* — is, that it is conditional, and that, even though the condition be not expressed, it is always implied. And why one class of gifts *inter vivos*, viz., that class covering those gifts which are *mortis causâ*, must always by their every nature be conditional; and yet that other gifts *inter vivos* cannot be good, if expressly made conditionally, neither the court in *Smith v. Dorsey*,¹ or any other case, has shown; nor, we think, can show.

The language in Kent, too, in effect from Blackstone, is essentially the same as in Parsons, and requires no comment, except the remark that both the text and the notes show that all he meant was, that generally delivery is essential to a parol gift of personal property, and that, on the gift being actually made (which it only is, in a conditional gift, so as to be perfected, when it becomes absolute by the condition being performed, and by being consummated by delivery), the gift goes then into “immediate and absolute effect;”² and that “without actual delivery the title does not pass. *A mere intention or naked promise to give, without some act to pass the property, is not a gift.*”³

So, in Bouvier, which, although not crediting Kent, is virtually in Kent’s language, and means nothing more. He says: “Gifts *inter vivos* have no reference to the future, and go into immediate and actual effect. *Delivery* is essential. Without actual possession, the title does not pass. A mere intention or naked promise to give, without some act to pass the property, is not a gift. There exists repentance [the *locus pœnitentiæ*] so long as the gift is [in-?] complete, and left imperfect in the mode of making it.”⁴

This simply means that generally delivery is essential to a gift *inter vivos*, as it is equally so to a gift *mortis causâ*. It does not express or imply that there cannot be a conditional gift, any more than it implies that there cannot be a conditional sale or conditional bailment. Nor does it imply that, as regards gifts *inter vivos*, they cannot be made on a condition, although testamentary gifts may be, and gifts *mortis causâ*, which are testamentary in their nature, always necessarily are.

In *Jones v. Selby*,⁵ the Lord Chancellor says: “A *donatio causâ*

¹ 38 Ind. 451.

² 2 Kent’s Com., 438.

³ Ibid.

⁴ *Pearson v. Pearson*, 7 Johns. 26; Bouv. Law Dict., tit. *Gift*, 2.

⁵ Prec. in Ch. 300, 303.

mortis is a gift *in præsentî* to take effect *in futuro*, and it is revocable during his life, as a will is, and so it differs nothing from a will, for it is not a present substantive gift." And in *Walter v. Hodge*,¹ it is correctly said: "To constitute a *donatio mortis causâ* or gift in contemplation of death, the transaction *must first possess the requisites of a gift*. By the law of England, in order to transfer property by gift, there must either be a deed or instrument of gift, or an *actual delivery* of the thing to the donee."² This is the very opposite of declaring that as a *donatio mortis causâ* must first possess the requisites of a gift, and as a conditional gift (according to *Smith v. Dorsey*)³ is invalid, therefore a *donatio mortis causa*, which is conditional, does not "possess the requisites of a gift;" and, therefore, there cannot be a *donatio mortis causâ*; it is not "a gift"!

The only case cited by Bouvier⁴ is simply on the question, which was the sole one in the contemplation of the different writers above quoted, viz., that delivery is generally essential to a gift. Thus the court said: "A gift is not consummate and perfect *until a delivery of the thing promised*; and until then, the party may revoke his promise. A parol promise to pay money as a gift is no more a ground of action, than a promise to deliver a chattel as a gift. It is the delivery which makes the gift valid. *Donatio perficitur possessione accipientis*."

This is very far from saying or implying that a conditional gift of a chattel, which has been delivered and the condition performed, is invalid. The principles governing conditions⁵ apply as well to gifts of chattels, as they do to assignments of real estate, or to sales, bailments, or any other agreements or contracts. The essential distinction in the gift is simply the delivery; not that it must be without condition. It must be a gift, — not a promise to give; but clearly, on principle, it may as well be, as a sale, conditional as unconditional. On this point, between a gift and a sale, we say advisedly, there is no distinction.

In *Noble v. Smith*,⁶ cited in *Pearson v. Pearson*,⁷ the essentials of "a perfect gift" are well stated, as capacity in the donor to make the gift; an acceptance by the donee, and a transfer of the possession. But, with these, there is nothing to prevent the gift being made conditionally in a gift *inter vivos*, any more than there is in what Kent, C. J., in this case, describes as "*the analogous case of gifts causâ mortis*," in which it is "*a delivery that is necessary to make the gift valid*."

¹ 2 Swanst. 92, 101, n. b.

² *Irons v. Smallpiece*, 2 B. & Ald. 552; *Hooper v. Goodwin*, 1 Swanst. 485.

³ 38 Ind. 451.

⁴ *Pearson v. Pearson*, 7 Johns. 26.

⁵ See authorities cited *supra*.

⁶ 2 Johns. 52.

⁷ 7 Johns. 26.

The case of *Bedell v. Carll*¹ is no better authority for the decision in *Smith v. Dorsey*,² than are the other authorities cited in it which we have examined. The entirely accurate language in *Bedell v. Carll*³ (in part quoted in *Smith v. Dorsey*) is: "A gift *inter vivos* when made perfect by delivery of the thing given is an executed contract [and as a contract or agreement, then, clearly as in other agreements or contracts, it may be with a condition], and effectually and irrevocably vests the property in the donee. *In short, all that is essential to constitute a valid transfer of property by parol gift is an expression to that effect by the donor, accompanied by a delivery of the thing to the donee.* Of course neither a donation *inter vivos* or *mortis causâ* is good without delivery; but in the one case the title passes immediately to the donee on delivery [the court was here simply treating of the gift in the case, which was one, without condition, of a promissory note of a third person to pay money in the future], and the donor has no more right over the property than any other person; in the other, the title does not pass immediately. *It is a conditional gift* [Mark this! *It is a conditional gift*], to take effect only on the death of the donor, who in the mean time has the power of revocation, and may at any time resume possession and annul the gift." A gift *mortis causâ* is here shown to come within the class of *conditional gifts*, in which particular conditional gift the peculiar conditions of a *donatio mortis causâ* are implied. Certainly this neither holds nor implies that there are not conditional gifts.

Dexheimer v. Gautier,⁴ previously stated by us, holds that a gift made by one in perfect health, and not in danger of death from some imminent or impending peril, was not a good *donatio mortis causâ*. The court here too speak of conditional gifts as though there could be no question that "a gift" may "be a conditional one." But they go farther, and intimate that if such a gift (which was expressed only to take effect in case of the donor's decease), if not void (evidently meaning thereby, if it were not void as a gift *mortis causâ*), was "an *absolute* one;" *i. e.*, one which became absolute when the condition was performed, and a gift notwithstanding that it was on condition.

Irish v. Nutting,⁵ the remaining case cited in *Smith v. Dorsey*,⁶ comes somewhat nearer to being an authority for the decision in the latter case than either of the other authorities upon which it relies. But it too fails to go to the extent of the holding in *Smith v. Dorsey*.⁷ In *Irish v. Nutting*,⁵ promissory notes of a

¹ 33 N. Y. 581.

² 38 Ind. 451.

³ 33 N. Y. at p. 584.

⁴ 34 How. 472.

⁵ 47 Barb. 370.

⁶ 38 Ind. 451.

⁷ 38 Ind. 451.

third party were given and delivered to the plaintiff by the defendant's intestate, after he had enlisted in the service of the United States, and before he had entered on actual service, but on the eve of his being ordered to the seat of war; the words and condition of the gift in effect being: "I give you these notes. If I never return they are yours." He left and never did return, but died away, of a disease contracted while in the service. It is manifest that this, like the other cases of the same class we have examined, was not a good gift *mortis causâ*, as there was no sufficient contemplation of death from any imminent cause. The court below held that it was a *donatio mortis causâ*. On appeal to the Supreme Court of New York, it was very faintly contended for the respondent that the gift was a good gift *inter vivos*; but the main contention was as to whether the gift was good or not *mortis causâ*. The appellant, merely in passing, claimed that "it was not a gift *inter vivos*, because it was conditional, and made to depend upon an uncertain event in the future. Gifts of this description have no reference to the future, and go into immediate and absolute effect. The donor renounces, and the donee immediately acquires, all titles and interest in the subject of the gift."¹ And the court, Bacon, J., delivering their unanimous judgment, and entirely misunderstanding the meaning of Blackstone, repeated, without explanation, by Kent, Parsons, Bouvier, etc., said:—

"On the argument some attempt was made to sustain the transaction as an executed absolute gift *inter vivos*, founded on the consideration [a gift does not require a consideration] of the services theretofore rendered the intestate by the plaintiff in the care of his clothing and providing him board. But it clearly cannot be sustained as such a gift, for the obvious reason that it was coupled with a condition, upon the happening of which the owner was to resume possession. An absolute gift which divests the donor's title, requires the renunciation on his part and the acquisition on the part of the donee, of all the title to and interest in the subject of the gift. It is very clear upon all the testimony that there was no intention on the part of the intestate to part with the absolute title to the notes; but he contemplated and provided for a future contingency, on the occurrence of which he should resume it, making the plaintiff in the mean time the custodian. A valid gift *inter vivos* has no reference to the future, but is one which goes into immediate and absolute effect.² The precise distinction between a gift *inter vivos* and *mortis causâ*, as is correctly said in *Bedell v. Carll*,³ is that in the one case the title

¹ Citing 2 Kent's Com., 438; 2 Blk. Com., 441.

² Kent's Com., 438.
³ 33 N. Y. 584.

passes immediately to the donee on delivery, and the donor has no more right to the property than any other person; in the other, the title does not pass immediately, but it is a *conditional gift*,¹ to take effect only on the death of the donor, who in the mean time has the power of revocation, and may resume and annul the gift."

Thus, it is evident, that the supreme court of New York did come to the conclusion, by what we think was a palpable failure to understand the scope and effect of the authorities on which they relied, that there could not be a valid conditional gift of personal property *inter vivos*. But having gone thus far, they took the position, as the court below had "only sustained the gift as a good one *mortis causâ*," that that was the only question with which they had to deal. So all that they (incorrectly, we should say) said as to the invalidity of all conditional gifts of personal property, was purely extra-judicial; and as far as the holding in this case on this point is concerned, *Smith v. Dorsey*² merely receives the support of — shall we say? an entirely unsound *obiter dictum*.

The error there made was repeated by the New York Court of Appeals, in *Doty v. Wilson*,³ where Church, C. J., delivering the unanimous judgment of the court, referring to gifts *inter vivos*, fallaciously says: "A condition attached to the delivery would invalidate a gift."⁴

To show how easily language, such as misled the courts in *Smith v. Dorsey*,⁵ in *Doty v. Wilson*,⁶ and in *Irish v. Nutting*,⁷ is calculated to mislead, we quote even stronger language from a little work⁸ recently issued (A. D. 1891), where, referring to gifts *inter vivos*, the author says: "The kinds of gifts treated in the last chapter are *absolute and unconditional transfers of property between living persons, where no revocation by the donor or reversion of the property is designed, or indeed possible*." And then he adds: "*The class of gifts to be now considered are distinguished from those in that they are conditional upon the happening of certain events, and since these conditions follow from the fact that they are made by persons in peril of imminent death, they are called gifts causâ mortis, or with a view to death*."

This, certainly, referring to gifts *inter vivos*, would seem to state much more definitely than could be implied from the language used by the writers quoted in the above-named cases, that

¹ The use of this general language "*a conditional gift*," would be absurd if there could not be such a gift.

² 38 Ind. 451.

³ 47 N. Y. 580, 585.

⁴ The authorities cited at the foot of the paragraph where this incorrect statement of law is contained, are *Hills v. Hills*, 8 M. & W. 404, and *Blount v. Burrow*, 4

Bro. C. C. 72; stated *infra*; but these cases are very far from sustaining any such principle of law as that alleged in the above proposition of the New York Court of Appeals.

⁵ 38 Ind. 451.

⁶ 47 N. Y. 580.

⁷ 47 Barb. 370.

⁸ Brantly on Personal Property, § 202.

there could not be a valid conditional gift *inter vivos*; but, obviously, the author quoted, notwithstanding the strength of the passages in the above we have italicized, did not expect to be so understood. For immediately preceding this, in the very "last chapter" to which he refers, in § 199, on "*Qualified and conditional gifts*" *inter vivos*, he says, in very apparent contradiction to the above: "A reservation of the right to recall and use during the life of the donor *does not* always defeat the gift. *A donor has the right to impose a condition upon his bounty, in which case the donee acquires a title when he has complied with the condition.*"¹

While we think this last statement is perfectly sound law, and is opposed to the unsound decision of the Supreme Court of Indiana in *Smith v. Dorsey*,² and to the equally unsound *obiter dicta* of the Supreme Court of New York, in *Irish v. Nutting*,³ it all suggests, we think, the great care which should be taken by courts and jurists in the choice of language they employ when undertaking to propound important and far-reaching propositions of law.

We have already alluded to the fact, that as contracts or agreements of sale and of bailment may be on such legal *conditions* as may be agreed on between the parties; so there is no reason, in principle, why a gift may not be made and accepted on conditions agreed on, or be subject to the usual rules as to conditions precedent and subsequent. In fact, gifts *are* made every day on conditions named; and in England, at least, it has never been so absurdly claimed, as it has been in the cases in this country which we have been considering, that a gift could not be made unless it were *absolute and unconditional*; using these terms here, not in the sense that where the gift is not by deed or by a testamentary instrument, it must generally be accompanied by delivery, and not left inchoate and as a mere promise to give; but, as these words would more properly imply, that the gift must vest absolutely on delivery and receipt as the vested property of the donee, without the possibility of being affected by any condition precedent or subsequent.

Such gifts, we repeat, are made every day,—by trust-deeds, marriage settlements, testamentary instruments,⁴ and as gifts *mortis causâ*; and in the numerous cases which have been decided in England in connection with such gifts, we have yet to find the first case in which it has been, even for one moment, contended of *any kind of gift*, that it must be an "absolute and

¹ *Ibid.*, § 199.

² 38 Ind. 451.

³ 47 Barb. 370.

⁴ See, in addition to the other authori-

ties cited *supra* in notes to this Part, 2 Jar. on Wills, Ch. 27, pp. 1-60, and the numerous cases there cited on conditions connected with such gifts.

unconditional transfer of property between living persons, where no revocation by the donor, or revesting of the property in him, is designed, or indeed possible ;” to requote the language we have above quoted, and which, in effect, is the language of the courts in *Irish v. Nutting*,¹ *Smith v. Dorsey*,² *Dexheimer v. Gautier*,³ and possibly in other cases in this country.

Before examining these cases named, we expressed the opinion that *Virgin v. Gaither*,⁴ and *Gass v. Simpson*,⁵ could not be sustained as *donationes mortis causâ*, but that they were sustainable as conditional gifts *inter vivos* ; and we are now quite satisfied that as far as *Irish v. Nutting*,⁶ *Dexheimer v. Gautier*,⁷ and *Smith v. Dorsey*⁸ were decided on the principle that there cannot be a conditional gift *inter vivos*, and the last of these cases, at least, was expressly decided on this ground, they are badly decided, and are not law.

The law, generally, is clearly correctly stated by the Tennessee court in *Gass v. Simpson*,⁹ thus: “*In case of a conditional gift*, when death is not expected, the condition [generally] must be expressed, and the contingency upon which it is to take effect, specified. But, in a case of a gift *causâ mortis*, both the condition and the contingency are implied from the occasion, and need not be expressed or specified.”¹⁰ But, as we shall see, not only may there be a conditional gift *inter vivos*, but even with a gift *mortis causâ*, the donor, notwithstanding the implied conditions, may supplement these ; as he may prescribe, in a trust-deed, marriage settlement, or any other gift *inter vivos* ; or by testamentary instruments ; or by any conveyance of real estate, — any legal conditions at his will.

In an old Massachusetts case, *Martrick v. Linfield*,¹¹ a father gave his daughter, then of age and living in the family, a female calf (whose dam had died), on condition that she would bring it up, and she brought it up by hand. The condition having been performed, and the cow having been taken away and sold for the father’s taxes ; in an action by the daughter, the court held that the property in the cow was in her, and the defendants were held liable to her in trespass for the value of the cow. So, in *White v. Palmer*,¹² it was held that “a parol transfer of personal property” may be made with restrictions and limitations. So, in the

¹ 47 Barb. 370.

² 38 Ind. 451.

³ 34 How. Pr. 472.

⁴ 42 Ill. 39.

⁵ 4 Coldw. 288.

⁶ 47 Barb. 370.

⁷ 34 How. Pr. 472.

⁸ 38 Ind. 451.

⁹ 4 Coldw. at p. 297.

¹⁰ And see *supra*, p. 37, *per* Gibson, C. J., in *Nicholas v. Adams*, 2 Whart. 17, 21; and *supra*, p. 41, *per* Lord Hardwicke, in *Ward v. Turner*, 2 Ves. Sen. 431, 435.

¹¹ 21 Pick. 325.

¹² 1 McMull. Eq. (S. C.) 115, 117.

more recent case in Pennsylvania, of *Riegel v. Wooley*,¹ where a brother gave his sister his stock of goods on condition that she would pay two of his outstanding notes, the jury having found that this was a gift and not a sale to the sister, this *conditional gift* was sustained by the Supreme Court of the State; it not being even contended that there could not be a conditional gift.

In Iowa too, in *Berry v. Berry*,² where by a gift from a father to his son of a tannery and its stock, *on the condition* that if the son kept sober and attended to his business for three years, the entire property in the tannery and stock was to be his; the court correctly laid it down as embodying “a very plain and elementary principle, that a donee may not dictate the terms to nor change those made by the donor; *he must take the gift with its conditions or not at all.*” It was claimed in this case that the court below should have instructed the jury, in effect, that under the facts in the case, the gift to be binding and irrevocable must be completed by delivery to the donee by the giver, or by his authority, without conditions; *or, if conditions were imposed, that they were complied with by the donee.* Here again, the gross error in elementary law was not even contended for, that there could not be a conditional gift *inter vivos* of personal property. The Supreme Court held that the jury should have been instructed, as here contended for, that if the tannery and stock were given to the son upon the condition that he should keep sober and attend to his business, or other condition, which the son did not comply with; or that he afterward abandoned the right to the donor or his agent, then he acquired no right thereto or to any part thereof which he could enforce in the action. And the court also held, as the conditional gift was made through an agent, that, whether the donee had or had not knowledge of the terms or conditions of the gift, he was alike bound by such terms and conditions; that he acquired the gift subject to them, and his title only became absolute on their performance by him. The language of the court in full on this point is:—

“If the donee had knowledge of the terms of the gift, *of course* he could not acquire a title by receiving the property in violation of such terms. And even if he did not have knowledge of the terms of the gift (but about which there can be no controversy), and received the property from the donor’s agent, he could not acquire a better title than the agent was authorized to confer; and the donor, in either case, would not be bound by his simple failure to repudiate it. If the donee, in the belief that his title was good, had changed his situation and expended money or the

¹ 81½ Pa. 227.

² 31 Iowa, 415.

like, then the donor might, by his failure to repudiate, be liable like a grantor for value to the application of the doctrine of equitable estoppel. And again, as to the instruction refused, it may be remarked that it embodies a very plain and elementary principle that a donee may not dictate the terms to, nor change those made by the donor. *He must take the gift with its conditions, or not at all.*" Every word of this, we confidently affirm, is undoubted law; or at least, it is so clearly law, that it should be "undoubted."

The same principle governing these cases, *i. e.*, that a gift may be conditional, and when conditional only becomes absolute on the performance of the condition, is, too, the governing principle in the recent case in the Supreme Court of New Hampshire (A. D. 1886), of *Marston v. Marston*.¹ There, M. made a present of promissory notes to the defendants, her children (the children, respectively, being the makers of the notes given to them), duly delivering the notes to them; but immediately after, as the result of conversation between them, she signed a writing stating that she had given the notes to the defendants, and then adding, "excepting hereby, after the notes are given up to each of them, by consent of said children I take the notes back as their property, to hold upon the condition that if I shall spend all the rest of my property and become poor and in want, I shall have a right to draw upon each of my said children *pro rata*, for such amount as I shall actually need for my support." The notes were then given back into the hands of M., where they remained until her death, after which they were given to the children as originally intended. The probate court held that the notes were assets in the hands of the administrator, and that, as such, he was chargeable for the amount of them. On appeal, on reference, the referee found that the delivery of the notes to M. was not intended as revesting in her the title to the notes, except in the contingency of her needing support, and as that contingency had never happened, the gift to her had failed, and the property in the notes was in the children. The Supreme Court, affirming the finding of the referee, and reversing the decree of the probate court, held that the original gift to the children, accompanied by delivery as an absolute and unconditional transfer of the notes to them, without condition or reservation, vested the property in the notes in them; and that this gift was not revoked, nor would the absolute title to the notes vest in M. by the new gift, except in the contingency which had never happened; thus, therefore, of course, sustaining the validity of conditional gifts *inter vivos*.

¹ 5 Atl. Rep. 713; 64 N. H. 146.

So in *Ducland v. Rousseau*,¹ a woman made a donation to another woman about to marry, and her children, of the right of habitation in a house in New Orleans, and of certain rights of use of the town-lot on part of which it was built, on condition that in case of the sale of the property by the donor, or of the death of the donor, those rights of use and habitation should cease to exist, and the donor or her succession should in either case pay the future wife the sum of \$1000 as an indemnity, within one month from the death or sale. This conditional gift was sustained, the court holding that *every condition attached to a donation, must be performed in the manner that the parties, by the terms of the gift, intended*. Again, in *Esqueridge v. Farrar*,² where it was held that an executor may, under suitable facts, maintain an action to annul a donation *inter vivos*, made by his testator,³ it was also held that where a condition on which a donation *inter vivos* was made had not been complied with, the donation might be revoked whether the property donated was in the possession of the donee or his assignee.⁴

The very recent case (December, 1889) in the Supreme Court of New York, of *Ridden v. Thrall*,⁵ although nominally holding that the gift was good *mortis causâ*, is a valuable one on the question of conditional gifts. As the gift in this case was on an *express* condition, it is quite immaterial whether the gift was sustainable or not as a *donatio mortis causâ*; with reference to which the court evidently was not without doubt.⁶ The gift was an unquestionably *good conditional gift*, whether it be called a gift *inter vivos* technically, or that kind of a gift *inter vivos* technically called a *donatio mortis causâ*. Strictly, we think, if the donor "died of a disease and from a cause which he did not anticipate, and from a peril which he did not foresee when he made the gift,"⁷ the gift was not really such a gift as is technically known as a *donatio mortis causâ*; as that gift only takes effect when the death results from "a contemplated peril." But, in that case, the gift is simply changed (when the condition is expressed, as in this case, and not merely implied, as it may be in a gift *mortis causâ*) into a conditional gift *inter vivos*; and the condition having been literally performed, the property in the gift to the donee vests absolutely in him.

¹ 2 La. Ann. 168.

² 30 La. Ann. 718, 722.

³ And see *Hart's Executors v. Boni*, 6 La. R. (O. S.), 97.

⁴ And see *Frazier v. Perkins*, 62 N. H. 69, where, with a gift, a suggestion was made by the donor that the money should be deposited in a savings bank in the name

of the donees; and the suggestion was held to be not a condition or limitation of the gift, but was merely advisory, and that the gift being for the benefit of the donees, their acceptance of it would be presumed.

⁵ 55 Hun, 185.

⁶ See p. 190.

⁷ Page 189.

We return now to the very late and important case on the subject, of *Ridden v. Thrall*.¹ There, E., being ill of hernia, and about to go to a hospital to submit to a surgical operation therefor, he said to his friend, the plaintiff, that he was going to the hospital to have an operation performed, and, if he did not return, a box and contents, which he gave to the plaintiff, he wished the plaintiff to have. The plaintiff, having the box in his possession, stated, in presence of E., to a third person, that as E. was going to the hospital, "if he does n't return, the box is for me to keep as my own;" to which remark E. assented. On the plaintiff endeavoring to cheer E., who was apprehensive of the result, the latter said that he did n't fear the operation, but he feared the result; evidently fearing that he would die as the result of the operation. He went to the hospital on the 2nd of October, 1888, and never returned. The operation was performed on the 5th, but he did not die until the 16th, and then the cause of his death was *myocarditis*, or a thinning of the muscular fibres of the heart. The question arose whether the property in the box and contents passed by the gift to the plaintiff, or not; and the court held that it did.

On the ground that *Virgin v. Gaither*² and *Gass v. Simpson*³ are sustainable, as express conditional gifts, which unquestionably can be made, notwithstanding the utterly absurd position to the contrary in *Smith v. Dorsey*,⁴ *Irish v. Nutting*,⁵ and in *Dexheimer v. Gautier*,⁶ the case of *Ridden v. Thrall*,⁷ holding that by the conditional gift, and performance of "the only condition impressed upon the gift," the property therein vested in the plaintiff, is, we think, without going to the length of holding that the facts met all the peculiar requirements of a *donatio mortis causá*, manifestly well decided.

And the decision in this case, in the Supreme Court of New York, as in the myriads of cases where conditional gifts *inter vivos* of both real and personal property are made, in marriage settlements and in trust-deeds, — and, therefore, where the subject of the gift admits of it, such gifts can as well be made by parol, accompanied with delivery, — shows clearly that *Smith v. Dorsey*⁸ was badly decided; as, also, outside of the mere technicality on which they were made to turn, were the New York cases of *Irish v. Nutting*,⁹ and *Dexheimer v. Gautier*.¹⁰

¹ 55 Hun (62 N. Y. Sup. Ct.), 185.

² 42 Ill. 39.

³ 4 Coldw. 288.

⁴ 38 Ind. 451.

⁵ 47 Barb. 370.

⁶ 34 How. Pr. 472.

⁷ 55 Hun, 185.

⁸ 38 Ind. 451.

⁹ 47 Barb. 370.

¹⁰ 34 How. Pr. 472.

In *Ridden v. Thrall*,¹ the court say, Dykman, J., delivering the judgment:—

“There is no reason why gifts should not be upheld as well as sales. Both are based upon the right of all people to do what they will with their own. Gifts are made without money and without price, from motives of affection or esteem. . . . The sales throughout the world are made verbally, and perfected by physical transfer and acceptance of the subject, and gifts are made in the same way and consummated by delivery, and one method of transfer should be as free as the other. Devises and bequests, like donations *mortis causâ*, are but gifts to take effect absolutely only upon the death of the giver; and if they are to be surrounded with safeguards beyond those requisite in transactions between the living, let it be so, but let not the intention of the donors be defeated. In this case, the donor intended to give the box and its contents, *if he did not return from the hospital*, to the plaintiff, and the evidence manifests the presence of every element necessary to constitute a gift in prospect of death. It never was revoked, *and the donor never returned from the hospital*, and never recovered from the illness from which he was suffering at the time when he made the gift. Much is said by the appellant respecting the immediate cause of the death of the donor at the hospital, and the contention is that he died of a disease and from a cause which he did not anticipate, and from a peril which he did not foresee when he made the gift; but there is no insistence that he recovered from the illness or survived the peril from which he apprehended his death. When he made the gift he was under the shadow of a great danger. He was about to submit to a surgical operation which he apprehended would be serious and might be fatal, and *if he never returned from the hospital the property was to belong to the plaintiff. His return was the only condition impressed upon the gift, and there is no reason why the court should impose another or any additional contingency.*” Hence, whether or not the case met, literally, all the requirements of a technical *donatio mortis causâ*, it was a good conditional gift; and, the condition, and “the only condition impressed upon the gift,” having been performed, the property therein vested absolutely in the donee; as, under analogous facts, it did in *Virgin v. Gaither*,² *Gass v. Simpson*,³ *Smith v. Dorsey*,⁴ *Irish v. Nutting*,⁵ and in *Dexheimer v. Gautier*.⁵

In the very recent New York case (A. D. 1890), of *Hamer v.*

¹ 55 Hun, at p. 189.

² 42 Ill. 39.

³ 4 Coldw. 288.

⁴ 38 Ind. 451.

⁵ 47 Barb. 370.

⁶ 34 How. Pr. 472.

Sidway,¹ the transaction was not sustained as a conditional gift *inter vivos*, only because there had been no delivery of the subject of the alleged gift, and it was held not to be a gift, but merely a promise to give. Here, in the sense in which the somewhat careless text-writers in this country have used the term, there was *no* “absolute gift;” but there was simply a promise to give. And in an English case,² in the judgment of Erle, C. J., and Keating, J.³, it is made perfectly clear — which we think we can positively affirm cannot be found questioned in any English case, or by any English text-writer — that there may be a valid gift *inter vivos*, subject to a condition. In this case the question was whether an alleged gift of an annuity was subject to the condition precedent that the plaintiff should continue to practise at the bar; and it was held, under the facts, not to amount to a condition *precedent*, but that it was a limitation or defeasance (virtually a condition subsequent), in event of a certain amount being made by the plaintiff from his profession.

That a gift may be good, although it is not “absolute,” in the sense in which that word is misunderstood in *Smith v. Dorsey*, *Irish v. Nutting*, and in *Dexheimer v. Gautier*, is also shown by the recent case in the English Court of Appeal, of *Mitchell v. Homfray*.⁴ There it was held that where a gift had been made which, from the fiduciary relation existing between the parties, might have been retracted by the donor; yet, as after that relation ceased, the donor had not elected to revoke the gift, it became absolute.

So, gifts *mortis causâ* have been sustained, coupled with a condition not usually connected with such a gift, and it has been held that such a condition did not make the gift void.⁶

In *Hills v. Hills*,⁷ Rolfe, B., well says: “If a man on his death-bed gives another \$1000, is it any addition to the evils attending this mode of bestowing property *that he attaches a condition to it*, as, for instance, that he stipulates that his brother shall receive an outfit to India?” The suggestion is, at least, as applicable and correct as to a gift *inter vivos* as to one *mortis causâ*.⁸

On the same principle that a valid gift *inter vivos* can be made subject to conditions, it can also be made subject to what are vir-

¹ 57 Hun, 229.

² *Shadwell v. Shadwell*, 96 C. B. N. S. 159, 175.

³ Concurred in on that point, by Byles, J.; see p. 179.

⁴ 8 Q. B. Div. 587.

⁵ And see *Dent v. Bennett*, 4 My. & Cr. 269, 275; *Wright v. Vanderplank*, 8 De G. M. & G. 133, 140.

⁶ *Hills v. Hills*, 8 M. & W. 401; *Blount v. Burrow*, 4 Br. Ch. C. 71.

⁷ 8 M. & W. at p. 404.

⁸ See also the very recent English case (A. D. 1887), of a voluntary gift on condition, of *In re Richards*, *Shenstone v. Brock*, 36 Ch. Div. 511; stated *infra*; and see *Woodburn v. Woodburn* (A. D. 1888), 123 Ill. 608, 621.

tually conditions, viz., reservations or limitations. Thus, in quite an old case in North Carolina, where there was a gift of a chattel from a father to his daughter, with a reservation to the donor of a life-estate therein, it was held that the gift was good, and that, the daughter having survived her father, the property in the chattel vested absolutely in her at his death.¹ So in *Seavey v. Seavey*² (A. D. 1888), a gift of promissory notes, with a delivery to A., with the condition or reservation that the donor was to have the interest on them, or such of it as he might need, as long as he lived, and that at his death the notes were to be equally divided between his two daughters, was held by the Court of Appeals in Illinois, affirming the judgment of the Circuit Court, to be a good gift *inter vivos*.

*Love v. Francis*³ is to the same effect. The law, without any reference to such an absurdity as that a gift *inter vivos* cannot be made with a condition, or reservation, or limitation attached, is well stated as to the essentials of such a gift, in this case (at p. 190), thus: "To constitute a valid gift *inter vivos*, there must be a delivery of the thing given, either actual or constructive. It is not necessary that it be delivered to the person intended directly. It may be delivered to some person for him, or to a trustee for that purpose, and in all cases such a disposition of it must be made in favor of the donee as effectuates the object, and places the *jus disponendi* beyond the power of the donor to recall. Under some circumstances the donor may constitute himself trustee of the thing for the benefit of the donee."⁴

In *Ellis v. Secor*,⁵ where the donor made a gift but reserved a life control, the Supreme Court of Michigan (at p. 189), in sustaining the gift as a *donatio mortis causâ*, correctly stated that such gifts were neither more nor less than a branch of voluntary gifts and settlements; and in the case of gifts of *choses in action*, they fall generally under the doctrine of trusts and equitable assignments; adding: "The cases are abundant where such transactions have been maintained, where the technical phrase *donatio mortis causâ* is not referred to."

Such cases, in vast numbers, which are really conditional gifts of real or personal property *inter vivos*, by deed or by parol, will be found in the authorities we have cited in this Part, on Conditions.

So in the old case of *Johnson v. Smith*,⁶ where there was a gift by deed to an illegitimate daughter, Lord Hardwicke held that from the facts it was not to be treated as then absolutely passing

¹ *Duncan v. Self's Admrs.*, 1 Murph. (N. C.) 466.

² 30 Ill. App. 625.

³ 63 Mich. 181.

⁴ *Ellis v. Secor*, 31 Mich. 185; *Green v. Langdon*, 28 Mich. 221.

⁵ 31 Mich. 185.

⁶ 1 Ves. Sen. 314, 316.

the entire property in the subject of the grant, but as a kind of gift *mortis causâ*, to take place only at the time of the donor's death. It was thus in effect treated as a kind of gift *inter vivos*, with a reservation of the right of the donor in it during his life; and it was decreed that at his death the daughter was entitled to the personal estate granted by the deed.

And in the late South Carolina case (November, A. D. 1887) of *Bennett v. Cook*,¹ the gift of a horse to the defendant on condition that when the donor wanted to ride the horse, he was to do so, was sustained as a good gift. So, in the same State, in *McKane v. Bonner*,² where the gift was of a slave girl, and by parol, with the condition that if the donor ever took up house-keeping again, she could borrow the girl, or, if the donor stood in need, the donee must pay something, was sustained as a valid gift.

In *Smith v. Savings Bank*³ (December, 1886), a gift of money in a savings bank to the donor's daughter, on condition that he was to have the income of it during his life, and his wife, if she survived him, to have the income during the remainder of her life, was sustained, although the donor subsequently undertook to bequeath the same money to his daughter by a will which proved invalid. An analogous gift was sustained in *Glasgow v. Flowers*⁴ (A. D. 1795).

The very recent North Carolina case (A. D. 1886) of *Egerton v. Carr*⁵ is to the same effect; holding that a gift which was only to take effect beneficially at the donor's death, was a good gift *inter vivos*.⁶

None of the English text-writers seem to have particularly discussed the question as to the making of conditional gifts of personal property *inter vivos*; and we do not find any of them expressly affirming or denying that a gift of personal property can be made conditionally precisely as well as it can be made unconditionally; providing it be in the one case, as in the other, an "absolute" gift (whether conditional or unconditional), accom-

¹ 28 S. Car. 353, 363.

² 1 Bail. (S. Car.) 113.

³ 64 N. H. 228.

⁴ Hayw. (N. Car.) 267.

⁵ 94 N. Car. 648.

⁶ And see also *Thompson v. McDowell*, 2 Dev. & B. Eq. 463; *Wyble v. McPheters*, 52 Ind. 393; *Stone v. Hackett*, 12 Gray, 227; *Gardner v. Merritt*, 32 Md. 78; *Nickerson v. Nickerson*, 28 Md. 332; *Millsbaugh v. Putnam*, 16 Abb. Pr. 380; *Howard v. Savings Bank*, 40 Vt. 597; *Minor v. Rogers*, 40 Conn. 512; *Trowell v. Carraway*, 10 Heisk. (Tenn.) 104; *Barker v. Frye*, 75 Me. 29; *Fletcher v. Fletcher*, 55 Vt. 325; *Eastman v. Savings Bank*, 136 Mass. 208; *Scott v. Savings*

Bank, 140 Mass. 157, 165; *Smith v. Savings Bank*, 64 N. H. 228, and the numerous cases to the same effect cited in *Smith v. Savings Bank*, 64 N. H. 228, and in *Seavey v. Seavey*, 30 Ill. App. 628. And see *Kekewich v. Manning*, 1 De G. M. & G. 176; *Collinson v. Patrick*, 2 Keen, 123; *Wheatley v. Parr*, 1 Keen, 551; *Ryeroft v. Chrysty*, 3 Beav. 238; *Fortescue v. Barnett*, 3 Myl. & K. 36; *Jarves v. Bydder*, 4 Beav. 600; *Ellison v. Ellison*, 6 Ves. 663. See also 2 Wash. on Real Prop. (4th ed.), 1-28, on Estates upon Condition, where much of the law there stated is as applicable to gifts on condition of personal property as of real estate.

panied with the due delivery, where the gift is not by deed or testamentary instrument, of the subject of the gift;¹ and not a mere promise to give, or inchoate gift.

In fact, it is entirely patent that conditional gifts of personal property can be made, whether by parol, or by deed, or other instrument, or by will; and such gifts, as we have seen, can be made either *inter vivos* or *mortis causâ*; and scores of the cases cited and referred to in the authorities we have examined show that they can so be made.

The general doctrine of conditions is as applicable to gifts, considered as contracts, as to any other contracts, and the law, as correctly stated by Judge Story,³ is very far from excepting gifts from the rule he there lays down, thus:—

“At law (and, in general, the same is equally true in equity) if a man undertake to do a thing, either by way of contract *or by way of condition*, and it is practicable to do the thing, he is bound to perform it, or he must suffer the ordinary consequences; that is to say, if it be a matter of contract he will be liable at law for damages for the non-performance; *if it be a condition, then his rights, dependent upon the performance of the condition, will be gone by the non-performance.*”⁴

We find among the many American writers, whose use of the terms “absolute” and “unconditional” in connection with gifts has tended to mislead courts, and to cause wrong decisions to be given, at least one American writer who correctly states the law specifically on the subject, without contradiction, or improper qualification, thus:—

“A gift may be made in the alternative, or so as to put the donee to his choice; in which case such choice must be made by him before delivery and acceptance can take effect. *And as to conditions in general, the usual rules would apply. Thus any lawful condition precedent imposed by the giver cannot be repudiated by the donee; nor will the latter’s title vest until he has performed the condition; on the other hand . . . the gift becomes complete through compliance with the condition.* If the condition fails, the thing may, as a rule, be recovered either from the donee or his transferee. And it is an equity rule, that where there is an absolute gift with some illegal condition or limitation annexed, the limitation fails, and the donee may retain the whole.”⁵

And in *Whiting v. Barrett*,⁶ the court went to the extent of holding that where the owner of personal property makes a verbal gift

¹ See *Cochrane v. Moore*, 25 Q. B. Div. 57; *Irons v. Smallpiece*, 2 B. & Ald. at 552, *per* Abbott, C. J.

² 2 Blk. Com. 441.

³ Story Eq. Jur. § 1302.

⁴ And see further, on Conditions, Story’s Eq. Jur. §§ 1302–1326.

⁵ 2 Schoul. Pers. Prop. § 123.

⁶ 7 Lans. (N. Y.) 106, 109.

to another, such other acquires a perfect title if he gets possession of it before revocation of the gift by the donor, although the subject of the gift was not present when the gift was made, or it was not even *in esse* at the time. At the time the gift was made" here, it was a mere inchoate gift, and was very far from being "absolute" in any sense.

In the very recent case of *In re Richards*, *Shenstone v. Brock*¹ (A. D. 1887), Miss Richards gave her promissory note to C., to be delivered at her death to E. H., subject to the condition that E. H. should continue to live with the donor until her death. After the donor's death, E. H. claimed the amount of the note from Miss Richards's estate, on the ground that there had been a complete gift of the note to her, subject only to the condition that she should remain in the service of Miss Richards until the death of the latter, and that, that condition having been fulfilled, E. H. was entitled to the amount of the note. The court sustained the conditional gift, and held that if the £200 had been paid in cash into the hands of C., the gift would have taken effect, in case the donee should have fulfilled the prescribed condition; and that it was not necessary for the completion of a voluntary gift that the money should have been paid over in cash into the hands of the person who was intended to receive it; it being sufficient if there was either a complete transfer of the property in the note, or a declaration of trust of it.²

A proposition was made by the Supreme Court of the United States in the frequently cited case of *Basket v. Hassell*,³ that where a condition annexed to a gift is a condition precedent, and where the contingency contemplated is the donor's death, the gift cannot be executed in the donor's lifetime, and consequently can never take effect. This proposition is, we think, radically unsound. If it were correct, not only would *Ridden v. Thrall*,⁴ which we have previously examined, be expressly wrongly decided, but the cases of *Virgin v. Gaither*,⁵ and *Gass v. Simpson*,⁶ and numerous other cases, English and American, could not be supported. But we think that it is quite clear that the proposition cannot be sustained.⁷

¹ 36 Ch. Div. 541.

² See *Lloyd v. Chune*, 2 Giff. 441; *Bonfield v. Hassell*, 32 Beav. 217; *Arthur v. Clarkson*, 35 Beav. 458; *Hall v. Palmer*, 3 Hare, 532.

³ 107 U. S. 602, 616.

⁴ 55 Hun, 185.

⁵ 42 Ill. 39.

⁶ 4 Coldw. 288.

⁷ In the very recent case (A. D. 1887) in *Virginia*, of *Sterling v. Wilkinson*, 83 Va. 791, the principle stated in *Basket v. Hassell*, 107 U. S. 602, 616, was acted on, where there was an assignment of bonds to

a third party, the interest on them to be paid to the donor for life, and in case of his death, the principal was to be divided between five parties named; and this very common form of gift was, under the unsound *dictum* of the Supreme Court of the United States in *Basket v. Hassell*, 107 U. S. 602, 616, held void. Obviously, to make such a gift valid, and not testamentary, there must be either a delivery of the subject or the creation of a trust, and the language used must not be testamentary in its character.

In the late English case of *In re Richards*, *Shenstone v. Brock*,¹ above stated, the condition of the gift taking effect in the donee was a condition precedent, and the contingency contemplated was the donor's death, and her title to the subject of the gift was held to vest absolutely in her on the performance of the condition. So in *Lloyd v. Chune*,² "the contingency contemplated" was "the donor's death," and the gift was held good. *Hall v. Palmer*,³ is to the same effect, where the gift was by deed. Other English and American cases to the same effect might be cited indefinitely, in addition to the numerous cases we have already examined.

We think that the mistake made by the United States Supreme Court in *Basket v. Hassell*⁴ was caused by their considering that a gift which was only to become absolutely operative on the contingency of death, must, therefore, be testamentary in its character. Such — as not only the above cited English cases, but numerous other well-decided English and American cases, many of which we have cited, show — is not the case.

A gift, when testamentary in its character, will, of course, only take effect by virtue of a valid will, and at the death of the testator. A case of that nature is *Mitchell v. Smith*,⁵ where the language indorsed on notes delivered by the holder to S., was, "I bequeath; pay the within contents to S. or his order at my death;" and it was held that the phraseology of the indorsement, connected with the remark of the donor that he wished to be master of the notes as long as he lived, but that at his death S. should have them, was held to show that nothing more than a testamentary disposition was intended.

So, in *Basket v. Hassell*⁶ itself, an indorsement on a certificate of deposit, "Pay to B.; no one else; then not till my death. My life seems to be uncertain; I may live through this spell. Then I will attend to it myself," was held not to take effect as an executed and complete transfer of the certificate of deposit to the donee, of possession and title, either legal or equitable, during the life of the donor; that, in effect, the indorsement was an abortive attempt at a testamentary disposition.

These cases may have been, and we think were, quite well decided, without affecting those which hold that where there is an actual gift *in presenti*, with delivery of the subject, the gift to become absolute *in futuro*, on the condition being performed, though the contingency be the death of the donor, as in *In re*

¹ 36 Ch. Div. 541.

² 2 Giff. 441.

³ 3 Hare, 532.

⁴ 107 U. S. at p. 616.

⁵ 4 De G. J. & S. 422; 10 L. T. N. S. 520, 801.

⁶ 107 U. S. 602.

Richards, *Shenstone v. Brock*,¹ *Ridden v. Thrall*,² *Virgin v. Gaither*,³ *Gass v. Simpson*,⁴ *Smith v. Dorsey*,⁵ *Irish v. Nutting*,⁶ and in *Dexheimer v. Gautier*,⁷ there is a valid conditional gift, to become absolute on the performance of the condition, or to be defeated (as the distinction in these cases on the point involved in them, between what are called conditions *precedent* and conditions *subsequent*, is more fanciful than real) on the failure of the condition.

In the old North Carolina case of *Thompson v. McDonald*,⁸ the fallacy of the court in *Basket v. Hassell*⁹ is well shown. There C. executed in Scotland (as is common there, as well as in England, Ireland, etc.) a *trust-deed*, making dispositions of real and personal property, to take effect after the death of the donor, and dependent on her death as an event necessary to the full execution of the dispositions of the deed. It was alleged in the bill, that, in the deed, the donor used the language, "I bequeath, assign, and convey," and, in the same instrument, that she constituted her trustees her "sole executors." It was claimed that this instrument could not operate as a deed, because its dispositions were in their nature merely testamentary. But the court held, and most properly so, we think, that the instrument operated *inter vivos*, as a deed; that to render it (the instrument) testamentary, it should be made to depend on the event of death as necessary to its own consummation, meaning here its operation; and, as the general structure of the instrument imported an immediate conveyance and its immediate operation as a deed, that it was not to be treated as a testamentary instrument.

So in the very late North Carolina case (A. D. 1886) of *Egerton v. Carr*,¹⁰ the same principle was acted on as in *Thompson v. McDonald*.¹¹ In *Egerton v. Carr*,¹² K. made an assignment of promissory notes, by deed, to C., in trust, to be equally divided between the grantor's three daughters after her death. The notes were then in the possession of C. as her agent. At the time of the execution of the instrument, the donor expressed to C. her wish that the notes should be kept by him until her death, and then delivered to the parties named. The notes were payable to her and remained undorsed, and remained in possession of C. until after the donor's death. In an action by her administrator for the recovery of the notes, the jury found for the plaintiff; answering, "Yes," to the question as to whether the

¹ 36 Ch. Div. 541.

² 55 Hun. 135.

³ 42 Ill. 39.

⁴ 4 Coklw. 288.

⁵ 38 Ind. 451.

⁶ 47 Barb. 370.

⁷ 34 How. Pr. 472.

⁸ 2 Dev. & B. Eq. 463.

⁹ 107 U. S. at p. 616.

¹⁰ 94 N. Car. 648.

¹¹ 2 Dev. & B. Eq. 463.

¹² 94 N. Car. 648.

plaintiff was the owner of the notes. On appeal, the Supreme Court of North Carolina reversed the judgment, which was rendered according to the verdict, and held that the instrument made *a present provision for conferring a future benefit* upon the objects of the donor's bounty; that the action was predicated upon the absolute nullity of the deed, or upon a reserved power of revocation in the donor, or upon the idea that because the instrument, not having been executed as a will, could not prevail as a testamentary instrument, it should fail altogether. The court disagreed with all these contentions. Smith, C. J., in delivering the judgment of the court, said :—

“The execution of the instrument was careful, and with a well-defined intent, not only conveyed in its terms, but orally made known at the time, *to make a present provision for conferring a future benefit* upon the objects of the donor's bounty. It purports to convert an agent into a trustee, and to attach trusts, which the defendant by his assent accepts and agrees to discharge. The trusts involve the retention and management of the securities thereafter, not as before, for the donor's benefit and under her control, but to account for and pay over their accumulations *at her death*; thus vesting *a present right in the donees* to have the fund secured, but not to be put in their possession until the happening of a future specified event, which must occur, though at an uncertain day. The funds which the donor declares, ‘I leave’ in the hands of the trustee, become his to hold and manage, and finally divide among the daughters, for which ends an equitable interest at once is vested in him. The only feature which gives a testamentary aspect to the paper, and upon which its nullity is made to depend, is found in fixing the period of enjoyment *at the donor's death*, while most of them point to a present and *inter vivos* act. It is but a partial disposition of the intestate's estate. A person is designated to manage the funds during her life, and whose functions cease with their delivery over when she dies; while the functions of an executor begin just where those of the trustee end. There is no reservation of authority or of interest in them thereafter, such as are implied in a gift *causâ mortis*. These are the qualities of a deed rather than of a will, and no attempt is made to put the instrument in the form required for the latter. ‘It does not follow,’ we quote from the opinion delivered in *Thompson v. McDowell*,¹ ‘because an instrument is to produce important results after death, that therefore it must be testamentary. To render it testamentary it is essentially necessary that it should be made to depend on the event of death as necessary to its own consummation.’”

Notwithstanding the unsound *dictum* of the Supreme Court of the United States in *Basket v. Hassell*,¹ and which led to the recent unsound decision in *Sterling v. Wilkinson*,² there is, we confidently affirm, no room whatever for doubt as to the soundness of the decision of the Supreme Court of North Carolina in *Egerton v. Carr*.³

In *Seavey v. Seavey* (December, 1888),⁴ a delivery of notes to the defendant, indorsed by the donor, to be held by the defendant, the donor to have what interest, if any, he wanted, during his life, and at his death the notes to be equally divided between the donor's two daughters, was held to be a good gift *inter vivos*.

So, in *Stone v. Hackett*,⁵ a gift upon trust to pay the grantor the income for life, and at his death the principal to go to certain charities, was held to be a good gift *inter vivos*, notwithstanding the donor had reserved a right to modify or revoke the gift. Bigelow, J. (subsequently C. J., and we think, incontestably, one of the ablest lawyers this country has produced), in delivering the judgment of the Massachusetts Supreme Court, said:—

“There was a legal transfer of the property fully executed to the plaintiff. There was also a full and explicit declaration of trust executed by her and delivered to the grantor, by which she accepted the gift, and took on herself the execution of the trusts which he intended to establish. Nothing was therefore left *in fieri*. The transaction was a completely executed transfer of property, and fully created a trust, which, according to the principle already stated, a court of equity is bound to recognize and enforce. It was suggested by the learned counsel for the widow that the donor never parted with his power or dominion over the property, because he retained a right to annul or revoke the trust. But this seems to us quite immaterial. A power of revocation is perfectly consistent with the creation of a valid trust. It does not in any degree affect the legal title to the property. That passes to the donee and remains vested for the purposes of the trust, not-

¹ 107 U. S. at p. 616.

² 83 Va. 791.

³ 94 N. Car. 648. See *Ellison v. Ellison*, 6 Ves. 656; *Colman v. Sarrel*, 1 Ves. Jr. 50; 3 Bro. C. C. 12. *per* Lord Thurlow; *Fortescue v. Barnett*, 3 Myl. & K. 36, and authorities cited 1 Lead. Cas. in Eq. (6th ed.) 300 *et seq.*; *Pulvertoft v. Pulvertoft*, 18 Ves. 99; *Ex parte Pye*, 18 Ves. 149; *Ex parte Dubost*, 18 Ves. 140; *Barlow v. Heneage*, Prec. in Ch. 211; *Bale v. Newton*, 1 Vern. 646; *Bolton v. Bolton*, 3 Swanst. 414, *n.*; *Johnson v. Smith*, 1 Ves. Sen. 314; *Green v. Langdon*, 28 Mich. 221; *Doty v. Wilson*, 47 N. Y. 580; *Stone v. Hackett*, 12 Gray, 227; *Martin v. Funk*, 75 N. Y. 134;

Miners v. Rogers, 40 Conn. 512; *Smith v. Savings Bank* (N. H.), 9 Atl. Rep. 792; *Ganish v. New Bedford Inst.*, 123 Mass. 150; *Love v. Francis*, 20 N. W. Rep. 847; *Eastman v. Savings Bank*, 136 Mass. 208; *Tillinghast v. Wheaton*, 8 R. I. 536; *Camp's Appeal*, 36 Conn. 88; *Hill v. Stevens*, 63 Me. 364; *Grimes v. Hone*, 49 N. Y. 17; *Sims v. Sims*, 8 Port. (Ala.) 449; *Millsbaugh v. Putnam*, 16 Abb. Pr. 380; *Howard v. Savings Bank*, 40 Vt. 597; *Nickerson v. Nickerson*, 28 Md. 332; *Gardner v. Merritt*, 32 Md. 78; *Miller v. Billingsby*, 41 Ind. 439.

⁴ 30 Ill. App. 625, 643.

⁵ 12 Gray, 227.

withstanding the existence of a right to revoke it. If this right is never exercised according to the terms in which it is reserved, as in the case at bar, until after the death of the donor, it can have no effect on the validity of the trusts or the right of the trustee to hold the property. Nor are we able to see any force in the suggestion that the trust which the donor created in some of its features looked to a disposition of the property which was the subject of the gift *after his death*. We know of no principle of law which renders such a transfer of property, *inter vivos*, invalid."

And, as we have seen, there being an "absolute" transfer of the subject of the gift, and not a mere inchoate gift remaining *in fieri*, the property in the gift vested in the donee in trust, subject to modification or revocation in accordance with the terms of the gift; and not being revoked or modified during the donor's life, took effect unconditionally at the death of the donor.

Contrary to the *dictum* in *Basket v. Hassell*,¹ and, following that, to the holding of the Virginia Supreme Court in *Sterling v. Wilkinson*,² the rule is, that where there is a gift *in presenti*, *inter vivos*, either of real or personal property; and where the gift is of personal property and by parol; a delivery, express or implied, of the subject of the gift to the donee, direct, or to a third party in trust for him; and the gift is to become absolute and unconditional *in futuro* only on the performance of a condition, — there is there a good gift *inter vivos*, though "the contingency contemplated is the donor's death."

This is unquestionably the law; and the *dictum* of the Supreme Court of the United States, Matthews, J., delivering the unanimous opinion of the court, in *Basket v. Hassell*,³ expressly to the contrary of this, is entirely unsound and absurd, and is unsustainable both on principle and by authority.⁴

Where, in *Wyble v. McPheters*,⁵ reversing the judgment of the Circuit Court, a donor, some eight months before his death, delivered to the defendant, McPheters, United States bonds as an absolute gift, to be held by the latter until the donor's death, and then to be handed over to the beneficiaries named; and, after the death, the donee in trust delivered the bonds to the donor's administrator; it was held, in an action against the donee in trust, and the administrator, that the gift was a good gift *inter vivos*. The court said: —

"There was a sufficient delivery to constitute a valid gift *inter vivos*. The delivery to McPheters was absolute, unconditional.

¹ 107 U. S. at p. 616.

² 83 Va. 791.

³ 107 U. S. at p. 616.

⁴ See *Johnson v. Smith*, 1 Ves. Sen.

314, 316, *per* Lord Chancellor Hardwicke; stated *supra* p. 66, *et seq.*; and other cases cited *supra*.

⁵ 52 Ind. 393.

The subject of the gift was to be unconditionally delivered by him to the plaintiffs, upon the death of the donor; an event which must at some time have taken place. The latter delivery was to depend upon no condition; the time thereof only was uncertain. The transaction created the relation of trustee and beneficiaries between McPheters and the plaintiffs. A delivery to a trustee for the use of the party to be benefited is as effectual as a delivery to the party himself."

So, in *Love v. Francis* (October, 1886),¹ where there was in effect a gift by the donor, to take full effect at his death, the interest being retained for his life, it was, as applicable to the facts in that case, correctly laid down, that, —

"To constitute a valid gift *inter vivos* there must be a delivery of the thing given, either actual or constructive. It is not necessary that it be delivered to the person intended directly. It may be delivered to some person for him, or to a trustee for that purpose, and in all cases such a disposition of it must be made in favor of the donee as effectuates the object and places the *jus disponendi* beyond the power of the donor to recall."

Thus, a gift is so far a contract that where it is made absolutely and unconditionally, without an express reservation of the right of the donor to revoke it, and perfected by delivery, where it is by parol, so that it is no longer *in fieri*, it can only be revoked by the donor, with the assent of the donee; and, where it is made subject to a condition, on the performance of the condition it vests absolutely in the donee, without any power in the donor, after the gift, when by parol, has been consummated by delivery, to revoke it either before or after the performance of the condition. The very essence of a gift *inter vivos*, where it is not expressly, or by fair inference, made subject to the right of the donor to revoke it, is that it is irrevocable.²

On the failure of the condition, the property in the gift reverts to the donor.³

In the former of those two last-cited cases the law is admirably laid down by Bingham, J., in delivering the unanimous judgment of the court; from which we quote at length, as follows: —

"If A. place money for B. in a bank, taking a deposit book for it in his name, and subsequently notifies him of the credit, and that he intended it as a gift, which B. accepts, does this vest the

¹ 63 Mich. 181, 190.

² See *Knott's Admr. v. Hogan*, 4 Metc. (Ky.) 99; *Minor v. Rogers*, 40 Conn. 512.

³ See *Eskridge v. Warren*, 30 La. Ann. 718; *Printing House v. Board of Trustees*, 104 U. S. 711. See further, as contravening the unsound rule in *Basket v. Hassell*,

107 U. S. at p. 616, that where the contingency contemplated is the donor's death, the gift, except when made by a valid testamentary instrument, is void, *Smith v. Savings Bank* (A. D. 1887), 64 N. H. 228; 9 Atl. Rep. 792; *Blasdel v. Locke*, 52 N. H. 238.

title in him, and divest A. of all title and possession of it, if he retains the deposit book? In *Blasdel v. Locke*,¹ a bill in equity by the administrator of the donor against the bank and the donee to recover a deposit, on similar facts, though less favorable to the defendant, it was held 'that the deposit created a trust in the bank in favor of B., and that, upon information of what had been done being conveyed by A. to B., and accepted by B., her title to the money became absolute, although there was no delivery of the deposit book.' The failure to deliver the deposit book did not make the transaction an executory instead of an executed trust and perfected gift.

"In the case at bar the father deposited in the bank, in his daughter's name, before her marriage, the money in controversy. He made no declaration to the bank other than to direct the deposit in his daughter's name, and receive the deposit book. He intended, however, the deposit as a gift to her, subject to his taking the income while he lived, and his wife's taking it for her life if she survived him. He afterwards showed the deposit-book to his daughter, she saw the entry, and he informed her of the gift, and she accepted it; he retaining the book during his life to enable him to draw the income. We understand the case to find that the father intended, at the time of making the deposit, to make a present gift to his daughter subject to the taking of the income, unless the evidence of the imperfectly executed will was in law conclusive. [The donor, after having made the gift *in presenti*, in 1874, to take effect *in futuro*, the "contingency contemplated being the donor's death,"² made an abortive will in 1878, and died in 1884.] The will was not conclusive evidence, even if competent, on the question, and the case stands on the finding of the court on all the evidence, including the will. The administratrix of the father claims that the transaction was in the nature of a testamentary disposition of the property not in accordance with the statute of wills. *Bartlett v. Remington*.³ In that case the deposit was made in the name of the person making it, for Sarah Storroe, on the trust that the depositor was to hold the title and the power to dispose of the property so long as she lived, and then what was left was to go to Sarah. This was held to be an executory trust, not an executed one. In this case the money was deposited in the name of a third party, the depositor intending to make a present gift of it, subject to the taking of the income. To establish a valid gift, a delivery of the subject-

¹ 52 N. H. 238.

³ 59 N. H. 365.

² *Basket v. Hassell*, 107 U. S. at p. 616.

matter to the donee, or some person for him, so as to divest the title and possession of the donor, must be shown; and the inquiry is whether a valid gift *in presenti* can be made of money, subject to the right of the donor to take the income. Such a gift, we think, may be made by a proper transfer to a trustee; and the question is whether the facts of this case present such a transfer. If A. deposits money in B.'s name, without his knowledge, intending it as a gift, it is not perfected, as the assent of both parties is necessary. *Pierce v. Burroughs*.¹ But when B. is notified of the gift, and accepts it, his legal title to the money is perfected; and if not paid on demand, he may maintain an action at law to recover it. A. could have no action for the money, either at law or in equity, as all title and right of possession have passed from him. Again, if A. deposits money in B.'s name, to his credit, intending it as a present gift, but to remain in the bank during the lives of A. and his wife, and that of the survivor, subject to the income being taken by them [which was the exact case of *Smith v. Savings Bank*],² the bank takes the money on the trust to hold it for the term, and at the close pay the principal sum to B.; and when B. is notified of the gift, and *accepts it with its burdens and conditions*, a title to the principal is perfected in him, subject to the equitable right of A. and wife to take the income. A.'s title and possession, and all right to a title or the possession of the principal, are as entirely divested at the moment of the acceptance as if it were to be paid by the bank to B. on demand. It is an executed perfect gift as to A. He has delivered the money to the bank. His dominion and power to revoke are gone. His situation is not dissimilar to what it would have been had he given the money accompanied by an unqualified delivery to B., vesting the title and possession in him, on B.'s undertaking to account to A. for the income he might receive from it during the term; the important difference being that the payment of the income to Smith and wife is secured and made through a trustee,—practically, at least, the safer way.”³

In the leading English case of *Drury v. Smith*,⁴ Lord Hardwicke

¹ 58 N. H. 302.

² 64 N. H. 228; 9 Atl. Rep. 792.

³ See further, *Blasdel v. Locke*, 52 N. H. 238; *Scott v. Bank*, 140 Mass. 157, 165; *Davis v. Ney*, 125 Mass. 590; *Gerrish v. Institution*, 128 Mass. 150; *Turner v. Estabrook*, 129 Mass. 425; *Ide v. Pierce*, 134 Mass. 260; *Eastman v. Bank*, 136 Mass. 205; *Sherman v. Bank*, 138 Mass. 581; *Nutt v. Morse*, 142 Mass. 1; *Curtis v. Bank*, 77 Me. 151; *Marston v. Marston*, 64 N. H. 146; *Robinson v. Ring*, 72 Me.

140; *Martin v. Funk*, 75 N. Y. 134; *Young v. Young*, 80 N. Y. 422; *Willis v. Smyth*, 91 N. Y. 297; *Mabie v. Bailey*, 95 N. Y. 206; *Burton v. Bank*, 52 Conn. 398; *Minor v. Rogers*, 40 Conn. 512; *Camp's Appeal*, 36 Conn. 88; *Millspaugh v. Putnam*, 16 Abb. Pr. 380; *Gardner v. Merritt*, 32 Md. 78; *Ray v. Simmons*, 11 R. I. 266; *Taylor v. Henry*, 48 Md. 550; *Howard v. Bank*, 56 Vt. 284; *Marcy v. Amagcen*, 61 N. H. 131.

⁴ 1 P. Wms. at p. 405.

says : "This is a gift in the testator's lifetime, *donatio causâ mortis*, and the possession transmuted, and certainly, notwithstanding the will, the testator had a power to give away any part of his estate in his lifetime; he might in his lifetime, after the making of his will, *give away any part of his estate absolutely*, and by the same reason might, notwithstanding the will, *give away any part thereof conditionally*."

We have now shown (1) that there may be a conditional gift, in opposition to the cases which expressly hold, and to the text-writers who are construed to affirm, that there cannot; (2) that to make such a conditional gift, as to make an "absolute" unconditional gift, it must not be an executory, an inchoate, a mere promissory, gift; but that there must be an actual gift *in presenti*, though it may only vest as such, unconditionally, *in futuro*; (3) that there must be an actual or constructive delivery of the subject of the gift either to the donee direct, or to a third person in trust for him; and an acceptance of the gift by the donee, express or implied; so that the dominion over the gift, where the express condition of it is not that the vendor may revoke it, is in the donee, irrevocably; and (4), contrary to the express holding in the badly-decided case of *Sterling v. Wilkinson*,¹ and to the unsound *dictum* which led to it, in *Basket v. Hassell*,² though "the contingency contemplated is the donor's death," as it was in *Sterling v. Wilkinson*; ³ yet, if there have been, as there was in that case, a gift *in presenti* to take effect *in futuro*, though "the contingency contemplated be the donor's death," the gift is irrevocable, and, on the contingency arising, by the death taking place, the absolute title will then vest in the donee unconditionally; unless, indeed, the gift be made only then still further to take effect, conditionally; when the gift will then only vest subject to such condition. That, to repeat, the *dictum* and holding that, where there is a gift on condition, and the contingency contemplated is the donor's death, the gift, as a gift *inter vivos*, is invalid, are unsound; and that, as we have seen, where there is a present gift (and not a mere promise to give), though it be on condition, and though the contingency contemplated be the donor's death, the gift is a good gift *inter vivos*: the point being whether there be a present gift, as in the late English case of *In re Richards, Shentstone v. Brock*,⁴ though to take effect absolutely only on the performance of the condition, in which case the gift is a good gift *inter vivos*; or a mere testamentary disposition to have no effect

¹ 83 Va. 791.

² 107 U. S. at p. 616.

³ 83 Va. 791.

⁴ 36 Ch. Div. 541.

at all *in presenti*, as in *Basket v. Hassell*,¹ and in *Ragsdale v. Bowker*;² in which case it must take effect by virtue of the testament or not at all.³ These are the conclusions to which our reasoning, so far, has brought us.

This brings us to notice another proposition of the United States Supreme Court in *Basket v. Hassell*,⁴ which besides containing, in effect, in the latter part of the paragraph, a very similar fallacy to that⁵ which we have been examining; also, in the first part of the paragraph, contains another statement which we think is calculated to mislead, or perhaps we should say is absolutely unsound. The paragraph is : —

“The point which is made clear by this review of the decisions on the subject, as to the nature and effect of a delivery of a *chose in action*, is, as we think, that the instrument or document must be the evidence of a subsisting obligation and be delivered to the donee, so as to vest him with an equitable title to the fund it represents, and to divest the donor of all present control and dominion over it, *absolutely and irrevocably*, in case of a gift *inter vivos*, but upon the recognized conditions subsequent, in case of a gift *mortis causâ*; and that a delivery which does not confer upon the donee the present right to reduce the fund into possession by enforcing the obligation according to its terms, will not suffice. A delivery in terms which confers upon the donee power to control the fund only after the death of the donor, when by the instrument itself it is presently payable, is testamentary in character and not good as a gift.”

Of the English cases cited to sustain these propositions as thus stated, not one of them does so.⁶

As far as the latter part of the above quoted paragraph affirms or implies that a present gift to the donee of a *chose in action*, or of a personal chattel, the ultimate benefit of which is to be derived by the donee only on the death of the donor, — the donor in the meantime, until the contingency arises, to receive the interest or income resulting from the *chose in action*, or to have the right of use of the chattel, is not a valid gift *inter vivos*, — we have already exhaustively shown that it is an entire misapprehension of the law of gifts.

We have now to deal with the proposition contained in the first

¹ 107 U. S. 602.

² Cited in 2 Bail. (S. Car.) at p. 590.

³ In *Pitts v. Magnum*, 2 Bail. (S. Car.) 588, a gift of a chattel, with delivery thereof, on the condition that the donors were to have the use during their life, was held invalid, on the ground that it was a

gift to take effect only *in futuro*; but we think the case was not well decided.

⁴ 107 U. S. at p. 614.

⁵ *Ibid.* at p. 616.

⁶ See *Powell v. Hellicar*, 26 Beav. 261; *Reddel v. Dobree*, 10 Sim. 244; *Farquharson v. Cave*, 2 Coll. 356; *Bunn v. Markham*, 7 Taunt. 224.

part of the paragraph. This, as the point is made to rest on the distinction between a gift *inter vivos* and a *donatio mortis causâ*, which distinction is as applicable to the gift of a personal chattel as to a *chose in action*, is, in effect, that there can be no valid *inter vivos* gift, unless it be “absolute and irrevocable.” We have already shown that if there be a gift *in presenti*, with a delivery and acceptance, it is a good gift even though it be on a condition.¹ Hence, as far as the term “absolutely” expressly or impliedly states that a gift cannot be made “conditionally,” the proposition is unsound.

Equally so, we think it is, where the allegation is that unless the gift be made “irrevocably,” it cannot be a good gift. If it can be made *conditionally*, it is clear that it can be made *revocably*; for the very condition upon which it is made, delivered, accepted, may then be a condition that it may be revoked.

A gift is so far a contract, clearly, as, among other essentials of a contract, to involve the *consensus ad idem*. Hence, to constitute a gift, there must be the meeting of minds of the donor and donee as to the subject of the gift; and equally so, clearly, as to the terms of the gift, if any are imposed. The essential distinction between a gift as a contract and any other contract is, that being voluntary, and having no consideration to support it, it generally (as there is the *locus pœnitentiæ* until it is executed) cannot be enforced so long as it remains *in fieri*; — a mere *nudum pactum*. But once executed, the distinction between a gift and other contracts disappears. Hence, it is clear, that when a gift is made, delivered, and accepted, and the minds of the parties have met on the condition that, on certain terms or conditions, it may be revoked, the gift is subject to such conditions, and may as well be subject to revocation as to any other condition; precisely, for instance, as the contract of bailment may be.

The gift in *Stone v. Hackett*,² fully stated by us *supra*, besides being on condition that the donor was to have the income of the subject of the gift — in this case, too, *choses in action* — during his life, was expressly made subject to the donor’s rights to modify the uses or to revoke the gift; and he having died, without having modified the uses or revoked the gift, the beneficiaries were held entitled to the property as a completely executed “absolute” gift *inter vivos*. The court correctly held, as we think is true beyond a peradventure, that a power to revoke does not affect its validity in default of the execution of the power. So, clearly, there may be a good gift, though an express power to revoke it is reserved. A gift *mortis causâ* is a gift *inter vivos*.³ If then there can be a gift

¹ See the numerous cases that we have cited to this effect *supra*.

² 12 Gray (78 Mass.), 227.

³ *Gass v. Simpson*, 4 Coldw. (Tenn.) 294.

inter vivos when it is technically a gift *mortis causâ*, carrying with it the implied condition of the right of revocation, there would seem to be on that ground also, in principle, no reason why any other gift *inter vivos* may not be made subject to the express condition of revocation.

And it is perfectly clear that it can be. Such gifts, both of real and personal property, are made every day. Such a provision — a power of revocation — is often contained in testamentary gifts; in trust-deeds; in marriage settlements, and in other instruments of gift.

See *Gaither v. Williams*,¹ where there was a gift to become operative in the beneficiaries only after the death of the grantors, who reserved to themselves “full power of revocation,” “even to the entire revocation” of the gifts which they had made under the instrument; and which gifts, had the grantors not revoked them, which they did, would have become “absolutely” operative when the contingency arose. Subsequently, however, they made another conveyance of the property, and the court held that, possessing the power to revoke the gifts, the second conveyance worked such a revocation; although, on its face, it did not purport to be an exercise of the power of revocation.

So in *Aylsworth v. Whitcomb*,² where an instrument was executed making a voluntary disposition (a gift) of the grantor's real and personal property, which contained no express power of revocation; but it was executed by the grantor under the impression that he could revoke it, the other party to the instrument admitting that it was executed on the belief and understanding by both parties that it was revocable; the court decreed, in effect, on the ground of mistake, that the grantor had the power to revoke the deed.

And in *Kennell v. Abbott*,³ where a legacy was given by a woman to a man in the character of her husband, whom she supposed was and described him as such, but who at the time of the marriage ceremony with her had a wife living: the court, after the donor's death, on the ground that where a legacy is given to a person under a particular character which he had falsely assumed, and which alone could be supposed the motive of the bounty, the law would not permit him to avail himself of it, annulled the legacy.

But as a rule, where a power of revocation is not expressly reserved and the gift has been made absolutely and unconditionally, and so vests in the donee, it then becomes irrevocable; where it

¹ 57 Md. 625.

² 12 K. I. 298.

³ 4 Ves. 302.

has been made without fraud or mistake, and where the donors do not occupy a fiduciary relation towards each other.¹

And, generally, the very essence of a gift *inter vivos* is, where it is not expressly made subject to the exercise of the right of revocation, and whether it is made either unconditionally, or if made on a condition, the condition has been performed, that it then becomes absolute and irrevocable.²

Under the correct decision in *Aylsworth v. Whitcomb*,³ stated *ante*, as well as on the principle that a gift possesses generally the qualities of an agreement or contract, it is clear that where there is no *consensus ad idem*,—no agreement between the donor and donee, say as to the subject of the gift, or any mistake between them which goes to the essence of the gift,—the gift can be revoked for mistake, without any express reservation of a power of revocation. And not only may the grantor or donor of a gift reserve, in the instrument making the gift, a power of revocation, but powers of revocation are by deeds of gift frequently vested in third parties.⁴

So, when a gift is made on condition, it is thereby necessarily implied that the gift, whether it be of real or personal property, may be defeated for non-performance of the condition; or, in other words, revoked. Thus it was held in *Eskridge v. Farrar*,⁵ that where the condition on which a gift had been made had not been complied with, the gift could be revoked, even though the property were in the hands of a third party.⁶

The same doctrine too, with reference to gifts to a charity, was sustained in the United States Supreme Court, in *Printing House v. Board of Trustees*,⁷ where⁸ they say:—

“Where certain contributions to a charity are proposed to be made upon certain express conditions, the rights of the donors

¹ *Fellow's Appeal*, 93 Pa. 470; *Storrs v. Barber*, 6 Johns. Ch. 166; *Chapin v. Laytin*, 18 Wend. 412; *Hunt v. Rausmanier*, 8 Wheat. 174; *Slifer v. Beates*, 9 Ser. & R. 166; *Sprague v. Woods*, 4 W. & S. 192; *Dennison v. Gohring*, 7 Barr. 175; *Reed v. Robinson*, 6 W. & S. 329; *Delameter's Est.*, 1 Whart. 362; *Reese v. Ruth*, 13 S. & R. 434; *Greenfield's Est.*, 2 Harris, 489; *Stone v. Hackett*, 12 Gray, 227; *Ellison v. Ellison*, 6 Ves. 656; *Keke-wich v. Manning*, 1 De G. M. & G. 176; *Egerton v. Carr*, 94 N. Car. 648.

² See *Knott's Admr. v. Hogan*, 4 Metc. (Ky.) 99; *Minor v. Rogers*, 40 Conn. 512; *Siggers v. Evans*, 5 El. & B. 366; *Sterling v. Wilkinson*, 83 Va. 791. The query was raised in *In re Richards*, *Shenstone v. Brock*, 36 Ch. Div. 541, 544; and see *Blasdel v. Locke*, 52 N. H. 238, 243, as

to a revocation of a gift *inter vivos*, on condition, before the condition had been performed; but we think the law is clear that where a gift is duly made, subject to a condition, and there is no reservation of a power to revoke, the power of the grantor to revoke is gone, unless there be a breach of the condition.

³ 12 R. 1. 298.

⁴ See *Smith v. Adkins*, L. R. 14 Eq. 402; *Buckell v. Blenkhorn*, 5 Hare, 131.

⁵ 30 La. Ann. 718.

⁶ *Berry v. Berry*, 31 Iowa, 415. *Marston v. Marston*, 5 Atl. Rep. 713; 64 N. H. 146; *Duclaud v. Rousseau*, 2 La. Ann. 168, and *Hart's Ex'ors v. Boni*, 6 La. R. (o. s.) 97, are to the same effect.

⁷ 104 U. S. 711.

⁸ At p. 717.

stand upon contract, and if the conditions are not performed, their obligation to contribute is discharged ;" that is, in effect, that the gift can be revoked.

And again, where fiduciary relations exist between the parties to a gift, it may be revoked on the ground of its having been made under undue influence.¹ But where the gift has been made between parties bearing a fiduciary relation, so that the gift is revocable at the option of the donor, and, after the fiduciary relation has terminated, the donor elects not to revoke the gift, as it is voidable only and not void, it then becomes absolute, and cannot be revoked by the donor's executors after his death.²

The incorrect test of a gift *inter vivos*, given in *Basket v. Hassell*,³ that it can only exist where the donor has been divested of control and dominion over it "absolutely and irrevocably," was practically, and we think wrongly acted on, in effect, by the New York Court of Appeals in the very recent case (November, 1889) of *Williams v. Guile*,⁴ although the case itself was evidently correctly decided in favor of the donee. A gift by deed was made by the plaintiff's intestate of a policy of life insurance, with its accumulations, some six or seven weeks prior to his death. The deed purported to have been made for a valuable consideration, and contained a clause to the effect that the assignment was subject to the express condition and reservation that the donor had power to revoke it at any time during his life. The deed was delivered to a third party for the donee, who, subsequent to the donor's death, collected the amount. In an action by the donor's administrator against the donee, the New York Supreme Court held⁵ that the gift was good *inter vivos*, and that the fact that the grantor reserved the right of revocation showed that he intended the deed to operate then, subject to the condition or reservation of the right to revoke; otherwise that that condition would have been sensible; as, if the gift were not intended to take effect *in presenti*, the reservation of a power to revoke would have been unnecessary, as there would have been nothing to revoke. We think they were entirely right. It was also claimed that the gift was good *mortis causâ*, but the court found it unnecessary to consider that point.

On appeal, the New York Court of Appeals held that the gift was a good *donatio mortis causâ*, but not a good gift *inter*

¹ *Brown v. Kennedy*, 4 De G. J. & S. 217; *Haguenin v. Basely*, 14 Ves. 273; *Rose v. Mynott*, 7 Yerg. 30; *Berrien v. McLane*, 1 Hoff. Ch. 421; *Farnam v. Brooks*, 9 Pick. 218; *Starr v. Vanderheyden*, 9 Johns. 253.

587. And see *Gregory v. Gregory*, G. Cooper, 201; *Wright v. Vanderplank*, 8 De G. M. & G. 133; *In re Holmes Estate*, 3 Giff. 337.

² 104 U. S. at p. 614.

³ 117 N. Y. 343.

⁵ *Williams v. Guile*, 46 Hun. 645.

² *Mitchell v. Hanfray*, 8 Q. B. Div.

vivos. We think their reasons for so holding are not satisfactory. They admitted that the facts were undisputed and not conflicting, and that they evidenced an unmistakable and clear intent that the donee should have the benefit of the policy unless the gift was revoked during the donor's life. The delivery of the deed having been equally as effectual to pass the property *inter vivos*, as *mortis causâ*, we think the better decision is that of the Supreme Court; that the gift of the policy was an existing gift *in presenti*, passing the property then therein, subject only to its being divested on the express condition named in the deed, viz., its revocation during the donor's life. And we think, under the facts, that had the donor, after the due execution and delivery of the deed, lived a dozen years, so that it could not reasonably have been contended that the gift was valid *mortis causâ*, and had not revoked the deed, the donee would then have been entitled to the proceeds of the policy under the conditional gift of a dozen years before.

The Court of Appeals seemed to have labored under the mistake as to the vesting of conditional gifts *inter vivos* so largely prevailing in this country.¹

In *Worth v. Case*,² where the donor's promissory note for \$10,000 was given to the plaintiff by her brother, in a sealed envelope, on which the donee's name was endorsed, and on which he had written and signed, "This is not to be unsealed while I live, and returned to me any time I wish it." Over three years after the gift he made his will, and died in the following month, not having revoked the conditional gift. In an action by the donee for the amount of the note, the New York Court of Appeals, in holding that the gift was a good gift *inter vivos*, brings the case of *Williams v. Guile*³ directly within its purview, thus:—

"A deed executed and delivered by a grantor, which is to take effect so as to pass the title at his death, is not in any sense a testamentary disposition of the property described in it; nor is a note, executed and delivered, and accepted, in the lifetime of the maker, but made payable at, or after his death, such a disposition of it; but, in both cases, the instrument is absolute, and passes the right to the land, in the one case, and to the money in the other, to vest in possession or action at the death of the grantor or maker. And if the note in question was delivered and accepted, the transaction is no more testamentary than in the cases of the deed and note referred to; and the only difference is, that in those the delivery passed the right without power

¹ But see *Worth v. Case*, 42 N. Y. 362;
Ruggles v. Lawson, 13 Johns. 285;
Wheelwright v. Wheelwright, 2 Mass. 447;
Hatch v. Hatch, 9 Mass. 307.

² 42 N. Y. 362.

³ 46 Hun. 645; 117 N. Y. 343.

of revocation, and without condition, while in this the power of revocation and the condition continued till his death. . . . I think the circumstances show that the maker of the note delivered it to her with the intention that it should be hers absolutely, unless he should thereafter apply to her for its re-delivery, or unless she should open the envelope during his life; or, in other words, that he intended to pass the title in it to her, subject to being divested (as she had the possession) by either of these acts; and that if neither of them were performed, the title to the note should remain in her.”¹

The intimation in *Basket v. Hassell*,² that, in effect, there cannot be a conditional gift *inter vivos*, but that to constitute such a gift, the donor must be divested of all “control and dominion over it, absolutely and irrevocably,” is in no sense any truer of a gift than of a sale. As we have seen that there may be a conditional gift, or a gift in connection with which the donor may expressly reserve a power of revocation; and that such gift may be revoked for fraud or mistake, or where it has been made under the exercise of undue influence, where fiduciary relations exist between the parties; so, with a sale, it may be expressly made subject to a condition, or it may be revoked for either of the reasons stated above as applicable to gifts.³

It will thus be seen, that the essential differences between a gift *inter vivos* and one *mortis causâ*, are, (1), that in the latter the

¹ *Worth v. Case*, 42 N. Y. at pp. 366, 367. See *Baker v. Williams*, 34 Ind. 547; *Daniel v. Smith*, 64 Cal. 346; s. c. 75 Cal. 548; *Walter v. Ford*, 74 Mo. 195; *Henshel v. Maurer* (November, 1887), 69 Wis. 576; *McCarthy v. Keaman*, 86 Ill. 292. In *Tate v. Leithead, Kay* (Eng. Ch.), 658, a man in his last illness, a few days before his death, drew a check for £900, payable to B., to whom he owed £200, and wrote on the same sheet, A. £200; B. £200; Executorship Fund, £500. The check was delivered to B., who presented it, and received the money prior to the donor's death. Sir W. Page Wood, V. C., in holding that the gift of £200 to A. was a good gift *inter vivos*, and not a *donatio mortis causâ*, said:—

“The question of *donatio mortis causâ* is involved in this matter, because I must regard the whole transaction, to see whether the donor intended merely to make B. his agent to pay the £200 to A. after his death. No doubt, the fact of the donor being on his death-bed, and treating part of the money as an executorship fund, are circumstances in favor of this argument; but then he was indebted to B. in the sum of £200, which he devoted part of the money to pay; and a

donatio mortis causâ can only be established by a necessary implication, or an expressed intention, that the gift should not take effect except in the event of the death of the donor. In this case, if he had recovered, he could not have revoked the gift of the £200 to B.; for I must assume that the donor intended to pay the debt which he owed to B. immediately, and not to make it dependent on his death; and, if so, I do not see how the circumstance of his treating part of the money as an executorship fund could compel me to infer that he intended the gift to A. to be a *donatio mortis causâ*, any more than the payment to B. himself. I am therefore of opinion that, when this money was paid to B. he became a trustee of £200 of it for A.”

² 107 U. S. at p. 614.

³ See *Hanson v. Meyer*, 6 East, 614; *Rugg v. Minett*, 11 East, 210; *Brogden v. Marriott*, 2 Bing. N. C. 473; *Thornell v. Balbirnie*, 2 M. & W. 786; *Mills v. Bagley*, 2 H. & C. 36; *Worsley v. Wood*, 6 T. R. 720; *Thompson v. Thompson*, 12 Tex. at p. 332. And see the subject of Conditional Sales fully discussed in a later volume of this work.

gift partakes so much of the character of a legacy or nuncupative will, that it is implied, even though it be not expressed, that the donor reserves the right of revocation during his life ; while generally, in a gift *inter vivos*, unless the right of revocation be expressly reserved, it can only, as a rule, be exercised on the failure of the condition, where the gift has been made conditionally ; and not at all, when the gift has been made "absolutely and irrevocably ;" and (2), a gift *inter vivos*, generally, when consummated by delivery, where no condition is expressly made, as a rule becomes absolute and irrevocable (subject to the exceptions above named, as to fraud, mistake, undue influence, etc.) ; while with a gift *mortis causâ*, as it is a gift made in contemplation of death, the condition is always implied, even though not expressed, that if the donor do not die from the contemplated peril, the implied contingency not having arisen, the gift fails.¹

In the great amount of litigation there has arisen in connection with gifts *mortis causâ* the questions mainly involved are, (1), as to what is the subject of such a gift, and (2), what is a sufficient delivery thereof.

As to what are the subjects of such a gift, although there has been much fluctuation in the law, and in some of the early decisions the rule was more stringent than now, it may now be said that all personal property and *choses in action* are such subjects, except where the *chose in action* amounts to an inchoate gift, as the donor's check, draft, or promissory note, unless perfected by payment.²

¹ See *Ward v. Turner*, 2 Ves. Sen. 433; *Bunn v. Markham*, 230, *et seq.*, per Gibbs, C. J.; *Tate v. Hilbert*, 2 Ves. Jr. 111; *Blount v. Burrow*, 1 Ves. Jr. 546. The best expositions in this country of the law generally, as to *donationes mortis causâ*, will be found in *Nicholas v. Adams*, 2 Whart. 17, 22, *et seq.*, by Gibson, C. J.; in *Merchant v. Merchant*, 2 Bradf. (N. Y.) 432, by Bradford, Surrogate ; and in *Gass v. Simpson*, 4 Coldw. (Tenn.) 238, 292, *et seq.*, per Hawkins, J. ; criticised by the Supreme Court of the United States in *Basket v. Hassell*, 107 U. S. at p. 608, *et seq.* See further, *Thompson v. Thompson*, 12 Tex. at p. 331; *Gourley v. Linsenberg*, 51 Pa. St. 345 ; *Michener v. Dale*, 22 Pa. St. 59.

² For cases as to the subject of the gift *mortis causâ*, see *Ward v. Turner*, 2 Ves. Sen. 431; *Walter v. Hodge*, 2 Swanst. 92; *Miller v. Miller*, 3 P. Wms. 356; *Lawson v. Lawson*, 1 P. Wms. 441; *Jones v. Selby*, Prec. in Ch. 300; *Bailey v. Snelgrove*, 3 Atk. 214; *Richard v. Syms*, 2 Atk. 319; *Hill v. Chapman*, 2 Bro. C. C. 612; *Tate v. Hilbert*, 2 Ves. Jr. 111;

Veal v. Veal, 27 Beav. 303; *Duffield v. Elwes*, 1 Sim. & St. 245; 1 Bli. n. s. 497; *Mitchell v. Smith*, 4 De G. J. & S. 422; *Moore v. Denton*, 4 De G. & Sm. 517; *Bouts v. Ellis*, 17 Beav. 121; *Gardner v. Paddock*, 3 Madd. 184; *Hurst v. Beach*, 5 Madd. 351; *Barton v. Garner*, 3 H. & N. 287; *Beak v. Beak*, L. R. 13 Eq. 439; *Witt v. Amis*, 1 B. & S. 109; *Amis v. Witt*, 33 Beav. 619; *Holliday v. Atkinson*, 5 B. & C. 501; *Parish v. Stone*, 14 Pick. 204; *Hill v. Buckminster*, 5 Pick. 393; *Mills v. Wyman*, 3 Pick. 208; *Bowers v. Hurd*, 10 Mass. 427; *Kiff v. Weaver*, 94 N. Car. 274; *Fairly v. McLean*, 11 Ired. 158; *Brickhouse v. Brickhouse*, 11 Ired. 404; *Gourley v. Linsenberg*, 51 Pa. 345; *Sessions v. Mosely*, 4 Cush. 87; *Harris v. Clark*, 3 Comst. (N. Y.) 114; *Wright v. McMillan*, 1 Cow. 598; *French v. Raymond*, 39 Vt. 623; *Smith v. Kittridge*, 21 Vt. 238; *Contant v. Schuyler*, 1 Paige, 316; *Grover v. Grover*, 24 Pick. 261; *Holley v. Adams*, 16 Vt. 206; *Craig v. Craig*, 3 Barb. 76; *Harris v. Clark*, 2 Barb. 94; *Cobb v. Sawyer*, 6 N. H. 386; *Wells v. Tucker*, 3 Binn. 366; *Borneman*

The rule as to the delivery is, that it may be made to the donee direct, or to any third party for him;¹ although, in several badly decided cases, it has been held that a delivery to a third party, with the express condition that the subject of the gift is to be given to the donee, in event of the donor's death, is not a sufficient delivery. The rule, however, is otherwise. The bailee, as in *Tate v. Leithead*,² will, in such case, be held to be a trustee for the donee.³ And the postponing of the gift to take effect irrevocably until the donor's death, is exactly what is implied by a *donatio mortis causâ*.

There must be an absolute delivery of the subject of the gift during the donor's life, but whether such a delivery by the donor be to the donee direct, or to a third party for him, is quite immaterial, if the donee elect to accept the gift. Of course, if the donee simply directs a third party to deliver the subject of the gift at the donor's death, and do not deliver the gift to the third party for the donee, one of the essentials of the gift, a delivery, is wanting, and the gift remains inchoate, amounting to no more than a mere promise to give. But when the delivery is actually made by the donee to a third party for the donee, unless the donee subsequently repudiate it, as it is generally for his benefit, his acceptance of it will be presumed. It is not necessary that he should have constituted the third party his agent to receive the gift; such third party is, by the donor, constituted a trustee for the donee. The question in connection with a gift *mortis causâ* is much simpler than with a gift *inter vivos*, as to the right of revocation before or after acceptance; because in the former the right of revoking is always implied, but not so in a gift *inter vivos*.⁴

v. Sidlinger, 15 Me. 429; *Bradley v. Hunt*, 5 Gill & J. 208; *Appeal of Walsh*, 122 Pa. 177; *Savings Bank v. Cupps*, 91 Pa. 315; *Sterling v. Wilkinson*, 83 Va. 791; *Appeal of Kline*, 117 Pa. 139; *Wertz v. Merritt*, 74 Iowa, 683; *Scott v. Lanman*, 104 Pa. 593; *Daniel v. Smith*, 75 Cal. 548.

¹ See *Tate v. Leithead*, Kay, 658.

² *Ibid.*

³ See *Love v. Francis*, 63 Mich. 181, 190, stated *ante*, p. 66; and see *Ellis v. Secor*, 31 Mich. 185; *Green v. Langdon*, 28 Mich. 221; *Wyble v. McPheeters*, 52 Ind. 393.

⁴ The following are some of the numerous cases on the subject of delivery, some few of which will be found not to be in harmony with what we think are the sound principles governing the matter: *Drury v. Smith*, 1 P. Wms. 404; *Lawson v. Lawson*, 1 P. Wms. 441; *Walter v. Hodge*, 2 Swanst. 92; *Hedges v. Hedges*, Prec. Ch. 269; *Jones v. Selby*, Prec. Ch.

300; *Hassel v. Tyrett*, Amb. 318; *Blount v. Burrow*, 4 Bro. C. C. 72; *Tate v. Hilbert*, 4 Bro. C. C. 286; *Miller v. Miller*, 3 P. Wms. 356; *Powell v. Hellicar*, 26 Beav. 261; *Ec parte Pye*, 18 Ves. 140; *Boutts v. Ellis*, 17 Beav. 121; *Farquharson v. Cave*, 2 Coll. 356; *Ward v. Turner*, 2 Ves. Sen. 431; *Bunn v. Markham*, 7 Taunt. 224; 2 Marsh. 532; *Hill v. Chapman*, 2 Bro. C. C. 613; *Hawkins v. Blewitt*, 2 Esp. 663; *Edwards v. Jones*, 7 Sim. 325; *Gardner v. Parker*, 3 Madd. 184; *Moore v. Denton*, 4 De G. & Sm. 517; *Pennington v. Gittings*, 2 Gill & J. 208; *Reddell v. Dobree*, 10 Sim. 244; *Moore v. Dalton*, 20 20 L. J. Ch. 626; *Hills v. Hills*, 8 M. & W. 401; *Raymond v. Sellick*, 10 Conn. 480; *Michener v. Dale*, 23 Pa. St. 59; *Sessions v. Moseley*, 4 Cush. 87; *Jones v. Deyer*, 16 Ala. 221; *Borneman v. Sidlinger*, 15 Me. 429; 21 Me. 185; *Peters v. Fort Madison Co.*, 72 Iowa, 405; *Lowthier v. Lowthier*, 30 W. Va. 103; *Clough v.*

In the New Brunswick case of *Earle v. Botsford*,¹ to which we have previously referred, where it was wrongly decided that “a gift made in contemplation of death” by suicide, was not “a gift made in contemplation of death” (*donatio mortis causâ*), the decision, on another ground, is still worse. In this case the gifts, duly labelled, were delivered by the donor to A., to be forwarded to B. “in case anything should happen to him” (the donor), which, it was conceded, meant in case of the donor’s death taking place, as he contemplated, by suicide. The junior three judges of the court held (neither of the senior three judges of the court sitting in the case), that the delivery was not sufficient. The case on this point is wrongly decided on two grounds: (1) The case was taken from the jury by King, J. (who delivered the judgment of the court in bank, the others simply assenting to it), with the frank admission of his ignorance of the law of gifts *mortis causâ*, solely on the ground that a gift *mortis causâ* must be made in a “last sickness;” and, therefore, the question as to the delivery was not properly before the court; and (2) A delivery of a gift by A. to B. for C., in contemplation of death, is a good delivery of the gift *mortis causâ*.

In fact, in a very large proportion of the gifts *mortis causâ*, as generally the act is sudden, the delivery by the donor is to a third party, for the donee. The decision otherwise in *Earle v. Botsford*,² was the result of the ground of the decision by Sir John Romilly, M. R., in *Powell v. Hellicar*,³ having not been understood by King, J.

In this latter case there was no delivery of the subject of the intended gift by the donor at all, either to the donee or to any other person for her. The subjects of the intended gift, a watch and trinkets, were not present, but a third party was directed to take the keys of the dressing-case and box, and after the donor’s death to deliver, not even the dressing-case and box, but the watch and trinkets, part of which were with other articles in the dressing-case. All that the Master of the Rolls held was that here there was no delivery by the donor at all. To have held otherwise would have been enlarging the doctrine of symbolical delivery much beyond its legitimate scope.

Clough, 117 Mass. 83; Dresser v. Dresser, 46 Me. 81; Henschel v. Maurer, 69 Wis. 576; Walter v. Ford, 74 Mo. 197; Daniel v. Smith, 64 Cal. 346; s. c. 75 Cal. 548; Hatch v. Atkinson, 56 Me. 324; Blanchard v. Sheldon, 43 Vt. 512; Caldwell v. Renfrew, 33 Vt. 213; Trow v. Shannon, 78 N. Y. 446, and authorities there cited; Grymes v. Hone, 49 N. Y. 17; Hunter v. Hunter, 19 Barb. 631; Fulton v. Fulton,

48 Barb. 582; Bedell v. Carll, 33 N. Y. 584; Wells v. Tucker, 3 Binn. 366; Hathaway v. Payne, 34 N. Y. 92; Hatch v. Atkinson, 56 Me. 324; Egerton v. Egerton, 17 N.J. Eq. 419; Miller v. Jeffries, 4 Gratt. 472; Savings Bank v. Fogg, 82 Me. 538.

¹ 23 N. B. Rep. 407.

² *Ibid.*

³ 26 Beav. 261.

A very large number of the cases cited on the subject of delivery in notes 3 and 4 to p. 87, *ante*, are cases where the delivery of the subject of the gift was made by the donor to a third party for the donee, and such delivery was held sufficient. The very late English case of *In re Richards*, *Shenstone v. Brock*,¹ fully stated *supra*, is of that nature. So is *Tate v. Leithead*,² and numerous other cases, English and American.

In *Moore v. Denton*,³ the donor delivered to her own maid the donee's receipt for £500, which he had borrowed from the donor, the donor directing the maid not to let the receipt go out of her possession until after her death, and then, immediately on her death, to deliver the receipt to the donee. This was held a good gift *mortis causâ* of the amount of the debt. From the cases cited in that case, not even a question seems to have been raised as to the sufficiency of the delivery; the doubt being as to whether the delivery of the *receipt* to the third party was a gift to the donee of the amount of his indebtedness.

So in the leading English case of *Drury v. Smith*,⁴ where the gift was of a bill of £100 given to a third party to be delivered over, in event of the donor dying of that sickness, to the donor's nephew; the gift was held to be a good gift *mortis causâ*; the sufficiency of the delivery not being there, either, even questioned.

In *Sessions v. Moseley*,⁵ Shaw, C. J., referring to a gift delivered to a third party for the donee, said:—

“The question is whether, under the circumstances, the transaction as stated by the sister constituted a valid gift of Moseley's note by the intestate, either as a gift *inter vivos*, or as a good *donatio causâ mortis*. The judge instructed the jury that if the donor, being sick and apprehensive of death, gave into the hands of L. the note in suit, with directions to give it after his death to W. for his own, and L. kept the note till after the death of the donor, and then give it to W. and he accepted it, the plaintiff was entitled to recover. This we think was correct. Here are all the requisites for a good *donatio mortis causâ*. A note of hand of a third person; a security for money, or a *chose in action*, however it may have been formerly considered, is now held to be a proper subject of such a gift. *There was an actual delivery to a person for the use of the donee*; an expectation of death; the death of the donor ensuing; a subsequent delivery to the donee; and an acceptance of the gift by him.”⁶

So in *Grymes v. Hone*,⁷ where the delivery of bank stock was

¹ 36 Ch. Div. 541.

² Kay, 658.

³ 4 De G. & Sm. 517.

⁴ 1 P. Wins. 404.

⁵ 4 Cush. 87.

⁶ *Parish v. Stone*, 14 Pick. 198.

⁷ 49 N. Y. 17.

to the donor's wife for the donee, intended as a gift *mortis causâ*, the court in sustaining the gift said : —

“ The declaration of the donor that his wife should keep the assignment and not hand it over till after his death, as he did not know what might happen, nor but that they might need it, was simply a statement of the law as to such a gift, whether the declaration was or was not made. Clearly he could not tell whether he should die or recover from that ailment. If he did recover, the law holds the gift void. The transaction as to such a gift is : The donor says, ‘ I am ill, and fear I shall die of this illness ; wherefore I wish you to take these things and hand them to my granddaughter after my death, but do not hand them to her now as I may recover and need them.’ A good *donatio mortis causâ* always implies all this. If delivered absolutely to the donee in person, the law holds it void in case the donor recovers, and he may then reclaim it.¹ To make a valid gift *mortis causâ*, it is not necessary that there should be any express qualification in the transfer or the delivery. It may be found to be such a gift from the attending circumstances, though the written transfer and the delivery may be absolute. . . . Was there a delivery ? The assignment was delivered to his wife for the donee. She thus became the agent of the donor. So far as the mere delivery is concerned, this is sufficient.”

In *Wells v. Tucker*,² the delivery of the gift for the donees was made by the donor to his wife. It was claimed that the delivery to the wife was in fact no change of possession, because the possession of the wife is the possession of the husband. But the court held that the delivery was sufficient. Tilghman, C. J., in so holding, thus correctly laid down the law : —

“ In the first place, the delivery was not to the donee, but to the donor's wife, to be by her delivered over. There is no objection to this mode of delivery. Whether made to the donee immediately, or to another for his use, is immaterial. It was so decided in *Drury v. Smith*.”³

So in *Michener v. Dale*,⁴ the donor, being on a voyage from San Francisco to Panama, and being attacked with cholera of which he speedily died, delivered gold dust and coin to the purser of the ship, saying that he wished it to go to his brother and sister. The court held that the gift was good *mortis causâ* ; that delivery was indispensable ; but whether made to the donee immediately or to another for him, was immaterial.⁵

¹ *Staniland v. Willot*, 3 Macn. & Gor. 664.

² 3 Binn. (Pa.) 366.

³ 1 P. Wms. 404.

⁴ 23 Pa. St. 59.

⁵ Among the many cases which hold this well-established doctrine, see *Clough v. Clough*, 117 Mass. 83; *Borneman v. Sillinger*, 6 Shepl. (Me.) 225; *Wheelright v. Wheelright*, 2 Mass. 447; *Hatch*

We consider the general subject of Delivery in a later volume of this work.

v. Hatch, 9 Mass. 307 ; *Hedge v. Drew*, 12 Pick. 141 ; *Foster v. Mansfield*, 3 Met. 412 ; *Richardson v. Lincoln*, 5 Met. 201 ; *Coutant v. Schuyler*, 1 Paige (N. Y.), 316 ; *Hunter v. Hunter*, 19 Barb. 631 ; *Hathaway v. Payne*, 34 N. Y. 92 ; *Southerland v. Southerland*, 5 Bush (Ky.), 591 ; *Tooley v. Dibble*, 2 Hill, 641 ; *Belden v. Carter*, 4 Day (Conn.), 66 ; *Ruggles v. Lawson*, 13 Johns. 285 ; *Williams v. Guile*, 117 N. Y. 343 (A. D. 1889). It is thus obvious that the gross ignorance of the New Brunswick court caused a complete failure of justice in *Earle v. Botsford*, 23 N. B. Rep. 407 ; as that case was not only decided wrongly, but inexcusably and ridiculously so, on both grounds on which the decision is made to rest.

BOOK I.

PART III.

BAILMENTS DISTINGUISHED.

WHERE there is a delivery of personal property and a transfer of a special but not the general property in the thing transferred, the transfer is a bailment and not a sale;¹ the general property remaining in the transferor of the special property.

¹ *Coggs v. Bernard*, 2 Ld. Raym. 917; *Jones on Bailment*, 1; 1 Sm. Lead. Cas. 199, and notes there to *Coggs v. Bernard*.

And such is the language generally employed in distinguishing a bailment from that transmission of chattels in which the absolute property is passed, and which, though in such cases the consideration is generally not money, is usually designated a sale. Thus in *Story on Bailments* (9th ed.), p. 4, note, "So, receiving goods from another, upon an agreement to sell and account for them to the owner, or to return them as good as when taken, with interest, has been held to be a bailment, and not a sale. . . . Bailment has reference to the treatment of a certain chattel or chattels, whose identity is to remain unchanged while the special purpose of the delivery is being accomplished. It is the identical thing, *not an equivalent*, which should be finally returned or delivered over. *This cardinal principle may aid in distinguishing between bailment and sale.*"

Differing from a bailment, to constitute a sale there must be an intention to pass the property. *Young v. Matthews*, L. R. 2 C. P. 127. In *Lomergan v. Stewart*, 55 Ill. 44, 49, the court held that when the identical thing delivered is to be restored, though in an altered form, the contract is one of bailment, and the title to the property is not changed; but when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor to make the return, and the title to the property is changed. It is a sale. In *Hunt v. Wyman*, 100 Mass. 198, the defendant agreed with the plaintiff to take the plaintiff's horse, and try it, and if he did not like it he would return it in as

good condition as he got it. After getting it, the horse ran away and was injured, and was not returned. The court held the transaction to be a bailment and not a sale. So, where goods were delivered to A. to be sold for the plaintiff, it was held that the contract amounted to a bailment and not a sale. *Morss v. Stone*, 5 Barb. 516.

The defendant orally agreed to convey to the plaintiff a lot of land valued at \$400, and to take, in exchange or payment therefor, a monument, estimated to be of the value of \$200, when completed, and the balance in money. After the monument was finished, the plaintiff tendered it to the defendant, together with the balance in money, according to the contract. The defendant refused to accept the monument or money, or to give the deed. The court held that whether this was a sale or an exchange of property was immaterial. Assuming that it was an exchange of the land for the monument, with a balance in money to be paid by the plaintiff, it was to be governed by the same rules as apply to a sale when the whole consideration is to be paid in money; citing *Anon.*, 3 Salk. 157; *Commonwealth v. Clark*, 14 Gray, 367, 372; *Howard v. Harris*, 8 Allen, 297. The contract was therefore held to be within the prohibition of the statute of frauds, as relating to the sale of land. *Dowling v. McKenny*, 124 Mass. 478. Where property has been left in a broker's hands for sale, and he has effected an exchange to which the owner assents, the broker is held to be entitled to his commission. *Redfield v. Tegg*, 38 N. Y. 212.

In *Smith v. Clark*, 21 Wend. 83, where a contract was made between a miller and other persons, for the manufacture of

It is often a nice question to decide, under the facts of the case, whether a transaction amounts to a sale or is only a bailment.

wheat into flour, he engaging on his part for every four bushels and 55 pounds of wheat received, to deliver one barrel of superfine flour, and there was no stipulation or understanding that the wheat delivered should be kept separate from other grain, or that the identical wheat should be returned in the form of flour; it was held, in terms, to be, in effect, one of *sale*; not of bailment. The court held, that as the miller was only to deliver a specific kind of flour, viz., "superfine, warranted to bear inspection in Albany or New York," it was wholly unimportant, under the contract, whether the flour was manufactured from the grain received, or from any other grain. The property in the wheat passed by the sale to the miller when it was delivered at the mill, and he became a debtor, and was bound to pay for the grain in flour of the specified description and property. Cases in great numbers in this country hold substantially the same doctrine. See, among others, *Powder Co. v. Burkhardt*, 97 U. S. 110, 116 (stated *infra*); *Pierce v. Schenck*, 3 Hill, 28; *Norton v. Woodruff*, 2 N. Y. 153; *Mallory v. Willis*, 4 N. Y. 76; *Foster v. Pettibone*, 7 N. Y. 433; *Rahilly v. Wilson*, 3 Dill. 420; *Chase v. Washburn*, 1 Ohio St. 244; *Loneragan v. Stewart*, 55 Ill. 44; *Johnston v. Browne*, 37 Iowa, 200; *Stearns v. Raymond*, 26 Wis. 74; *Grier v. Stout*, 2 Ill. App. 602; *Richardson v. Olmstead*, 74 Ill. 213; *Bastress v. Chickering*, 18 Ill. App. 198; *Barnes v. McCrea*, 75 Iowa, 267; *Hurd v. West*, 7 Cow. 752; *Reed v. Abbey*, 2 N. Y. Sup. Ct. 380; *Carpenter v. Griffin*, 9 Paige, 310; *Moore v. Holland*, 39 Me. 307; *Carlisle v. Wallace*, 12 Ind. 252. See 6 Am. Law Rep. 450, *et seq.*; 2 Kent's Com., 12th ed. 590.

In *Rahilly v. Wilson*, 3 Dillon, 420, it was held, where there was an express contract, or an agreement implied from the known and invariable course of business, that the warehouseman or elevator proprietor might hingle specific wheat received, with other wheat of like kind and grade, and ship or sell at his pleasure, with the further agreement or understanding that, on demand, he would pay the person from whom the grain was received the highest market price, or deliver the same amount of grain of a like quality, but not the identical grain deposited, nor grain from any specific mass, that such a transaction was a sale at the time of the delivery, and not a bailment. This case was decided in the Circuit Court for the district of Minnesota. Subsequently, by act

of March 3, 1876, it was enacted, "That whenever any grain shall be *delivered for storage* to any person, etc., such delivery shall in all things be deemed and treated as a bailment, and not as a sale of the property so delivered, notwithstanding such grain may be mingled by such bailee with the grain of other persons, and notwithstanding such grain may be shipped or removed from the warehouse, elevator, or other place where the same was stored. And in no case shall the grain so stored, and which such bailee may hereafter be required to keep on hand, be liable to seizure upon any process of any court in an action against such bailee." An action was brought in *McCabe v. McKinstry*, 5 Dillon, 509, by the plaintiff, as assignee in bankruptcy of the W. Co., to recover \$576.65 alleged to have been paid by the company to the defendant as a fraudulent preference under the Bankrupt Act. Under a contract entered into between the defendant and the W. Co. after the passage of the above Act, the question arose in the case whether, notwithstanding the Act, the contract, under which the W. Co. received a quantity of wheat for the defendant, was one of sale or bailment. The Circuit Court, in affirming the judgment of the court below, that, under the facts in the case, the transaction was a sale, and not a bailment, said: "Grain may be disposed of by the owner to a warehouseman, or to an elevator or mill proprietor, either by sale or bailment. In the former the title passes; in the latter it remains with the owner. It is sometimes difficult to determine whether a particular transaction is a sale or bailment. If a specific amount of grain is deposited by the owner, which is not to be changed by the bailee, but retained until called for, when the identical grain is to be restored, this is, of course, a plain case of bailment. Under the Minnesota statute, however it might be in the absence of such an enactment, a specific amount of grain deposited for storage does not cease to be a bailment, and does not become a sale, because it is mingled by the warehouseman, or elevator or mill proprietor, with the grain of other persons, since the statute authorizes the intermixture of grain of the same kind and grade, and recognizes the continued ownership of the depositors to a quantity of grain equal in amount to that by them respectively deposited. . . . There is an inherent difference between bailments and sales. If I deposit my wheat to be stored and safely kept for me, my property remains, and I extend

Thus the question was raised in *Powder Company v. Burkhardt*,¹ whether the transaction in that case was a bailment or a sale.

no credit to the bailee. But if I leave my wheat with him, with authority to sell it for his own benefit, and not as my agent, and upon his promise to pay me the value of the wheat, or to give me a like quantity of wheat when I shall demand it, the transaction is in its essence a sale of my wheat, and the extending by me of a personal credit for its value. I see no satisfactory evidence that the Minnesota Act meant to abrogate essential distinctions between bailments and sales, so far, at least, as to place the grain owner who authorized the warehouseman to sell, and the grain owner who only authorized him to store and safely keep, upon the same footing. Let me illustrate. Suppose I deliver 1000 bushels of wheat to a warehouseman or elevator proprietor, with authority to sell, and it is sold; and the next day you deliver to him 1000 bushels to store, and he does so; the next day he fails, with your 1000 bushels on hand and no more. Was it intended by the Minnesota legislature that I might take the 1000 bushels by replevin, or even share it *pro rata* with you. It seems to me not. The Act, although not carefully drawn, and in many of its provisions far from clear, seems throughout to confine its remedial provisions to persons who deposit grain for 'storage' or safe keeping, and not to those who deposit it for sale. The Act is conceded to have been passed in consequence of the decision in *Rahilly v. Wilson*, 3 Dillon, 420; and I have felt, in view of the facts of that case, considerable embarrassment in ascertaining the precise scope of the Act, although its general purpose is manifest. While it must be admitted to have made important provisions to protect persons who deliver grain for storage, I am inclined to think that it was not intended to embrace the case of persons who deliver grain to the warehouseman with express authority to sell the same on his own account, and upon an understanding that he is to pay the value of a like quantity of grain, or to deliver a like amount upon demand; nor to embrace the case of one who leaves wheat with a miller, with authority, as in *Randell's Case*, L. R. 3 P. C. 101, to use it as part of his current consumable stock, and upon an agreement to pay the farmer or owner the value, or to deliver a like quantity when demanded." See *Humilton v. National Bank*, 3 Dillon, 230, as to questions between the assignee and bailees.

In the very late case of *Lyon v. Lenon*,

(A. D. 1886), 106 Ind. 567, the defendant, L., received a quantity of wheat from the plaintiff, giving him a receipt therefor. In replevin against the defendants for the recovery of the wheat, the verdict and judgment being for the defendants, the court held that, from the evidence, the jury might have found that L.'s business was not that of a warehouseman; that he was engaged in purchasing and shipping grain; that the wheat in question was delivered upon the understanding, implied from the known course of L.'s business, that it was in no event to be kept for the plaintiff, or that either the wheat delivered, or other wheat of like quality, was to be returned on demand; but that it would be shipped and sold at L.'s pleasure on his own account, and that the plaintiff was entitled, upon presentation of his receipts, to demand the market price of wheat at the date of such presentation, and nothing more. The court said: "Wheat delivered under such a state of facts as we have assumed, the jury may have found would be a delivery in pursuance of a sale. In such a transaction there would be no element of a bailment. A contract of bailment contemplates the return of the goods bailed, or, growing out of the necessities of commerce, where grain is delivered in store, other grain of like quality and grade may be returned in its stead. We recognize the doctrine, that if wheat is delivered in pursuance of a contract of bailment, the mere fact that it is mixed with a mass of like quality, with the knowledge of the depositor or bailor, does not convert that into a sale which was originally a bailment. *Nelson v. Brown*, 44 Iowa, 455; *Nelson v. Brown*, 53 Iowa, 555; *Sexton v. Abbott*, 53 Wis. 181. Upon the facts in this case, there was no bailment to begin with. Where grain is received by a dealer under a contract, either express or implied, to pay the person delivering it the market price whenever he chooses to demand it, and such grain is mixed with other of like quality in bins from which shipments are being made daily, there being no understanding that the owner shall have the right to demand either his own or a like quantity of other in return, the dealer becomes the owner of the grain, and is liable to pay for it whenever called upon. As in such a case the contract from the beginning furnishes the criterion by which the price is to be fixed, it is not invalid. *McConnell v. Hughes*, 29 Wis. 537; *Richardson v. Olmstead*, 74 Ill. 213."

The plaintiffs agreed with one Dittmar, the inventor and discoverer of an explosive compound called "dualin," for its manufac-

The jury were instructed that if L. was engaged in buying and selling grain, and received the plaintiff's wheat, and with his consent mixed it with other wheat in his warehouse, and gave receipts for it showing the number of bushels received, and with his consent shipped and sold his wheat without any agreement to hold a like quantity in store to be delivered to the plaintiff on demand, then the transaction was a sale. The court, in sustaining these instructions, said: "This was a substantially correct statement of the law. If from the circumstances an agreement could have been inferred that the plaintiff's wheat might be sold without keeping either that or any other to replace it on demand, we are unable to conceive how it could have been deemed a bailment. Where wheat is received under the circumstances supposed, if the dealer has the right at his pleasure either to ship and sell the same on his own account, and pay the market price on demand, or retain and redeliver the wheat, or other wheat in the place of it, the transaction is a sale. It is only where the bailor retains the right from the beginning to elect whether he will demand the redelivery of his property, or other of like quality and grade, that the contract will be construed to be one of bailment. If he surrenders to the other the right of election, it will be considered a sale, with an option on the part of the purchaser to pay either in money or property as stipulated. The distinction is, can the depositor by his contract compel a delivery of wheat, whether the dealer is willing or not? If he can, the transaction is a bailment. If the dealer has the option to pay for it in money or other wheat, it is a sale. *Johnstone v. Browne*, 37 Iowa, 200; *Chase v. Washburn*, 1 Ohio St. 244." *Anstric v. Seligman*, 18 Fed. Rep. 519; *Hughes v. Stanley*, 45 Iowa, 625; *Wilson v. Cooper*, 10 Iowa, 566; *Seymour v. Wyckoff*, 10 N. Y. 216; *Ewing v. French*, 1 Blackf. 354; *Butterfield v. Lathrop*, 71 Pa. St. 226; *Barnes v. McCrea* (A. D. 1888), 75 Iowa, 267; *Ashby v. West*, 3 Ind. 170; *Pribble v. Kent*, 10 Ind. 325; *Fishback v. Van Dusen*, 33 Minn. 111, 123, hold the same doctrine.

The contract in *Carlisle v. Wallace*, 12 Ind. 252, was that wheat which was placed in the defendant's mill was delivered and received upon the terms that the defendant was at liberty to mix it with his own, convert it into flour when he pleased, sell the flour, and appropriate the proceeds to his own use; and whenever the plaintiff saw fit, he had a right to exact from the

defendant the same quantity in kind of wheat, or the amount of flour so much wheat would make, or the then price of wheat per bushel in money. The wheat was consumed, with the mill in which it was, by fire. In an action for the price, the defendant relied upon an alleged custom of the locality that when millers received wheat on the terms named, it was at the risk of the seller until he called for his pay. The court held that no such custom, assuming even that it was valid, was established; and, further, that as neither the identical wheat nor the flour made from it was to be returned to the plaintiff, and the wheat was not to be kept separate, but to be mixed with that of the defendant, and used by him when he pleased, the contract of delivery must be regarded, upon its terms, as one of sale and not of bailment.

In *Jones v. Kemp*, 49 Mich. 9, in October, 1875, plaintiff delivered wheat to defendant, under an arrangement that the wheat was to be paid for on delivery, or at any subsequent time when the plaintiff demanded payment, at the price then current. The defendant had the right to mix the wheat with other wheat, and to use it. In June, 1876, the plaintiff called for his payment, and was induced by the defendant to take the defendant's check for the amount. The defendant was then insolvent, and the check was not paid. The action was on the ease for fraud in the purchase. The court below held that the deposit was a bailment, and the transaction of June the only sale, and gave judgment for the plaintiff. The Supreme Court of Michigan held, reversing the judgment, that as the plaintiff reserved no right to recall the wheat, or any wheat or flour in its place, and the defendant reserved no right to return it actually or in kind, he was bound at all events to keep it, and to pay for it on demand; the money being payable without contingency, and the transaction of October being a sale and delivery and not a bailment, the plaintiff's only remedy was for the price of the wheat. *Ives v. Hartley*, 51 Ill. 520, is another case, where, under facts somewhat similar to those in *Jones v. Kemp*, 49 Mich. 9, the defendant was held liable for wheat which he claimed was received for storage only, and which was burnt, — the contract under which the wheat was received, and part of which was paid for in flour, being held to have been a sale and not a bailment.

In *Slaughter v. Green*, 3 Rand. (Va.) 3, it was held, where wheat is delivered

ture; which the plaintiffs were to have the exclusive right of selling to others. The plaintiffs were to advance to Dittmar

at a mill to be ground, upon an agreement that the miller shall return a given quantity of flour for so many bushels of wheat, the miller is a bailee and not a purchaser; and, therefore, if the wheat be consumed by accidental fire, the miller will not be responsible for it; and that, although the understanding was that the miller was not bound to return the flour made from that identical wheat, but might return flour of a certain quality made from any wheat in the mill. See *Foster v. Pettibone*, 7 N. Y. 433; *Meadowcroft v. German National Bank*, 95 Ill. 124; *Canadian Bank v. McCrea*, 106 Ill. 281. So, in *National Bank of Pontiac v. Langan* (A. D. 1888), 23 Ill. App. 401, it was held, that in a deposit of grain in a public warehouse, to be mixed with other grain, such depositor becomes the owner of an equal quantity of grain of the same kind and quality as that deposited, and that the title to such deposited grain does not pass to the warehouseman; it being a bailment and not a sale. *Bretz v. Diehl* (A. D. 1888), 117 Pa. 539, is to the same effect. See, also, the Canadian cases of *Stephenson v. Ranney*, 2 U. C. C. P. 196; *Isaac v. Andrews*, 28 U. C. C. P. 40; *In re Williams*, 31 U. C. Q. B. 143, in accord.

In the very recent case of *Reherd's Adminstr. v. Clem* (Nov. 14, 1889), 86 Va. 374, a receipt for wheat received by the defendant was given R., containing the clause "for which we are to pay market price same quality of wheat *whenver Mr. R. wants to sell same.*" The wheat was used by the defendants, subsequent to which their mill, containing a large quantity of wheat, was burnt. All of the wheat saved was sold by the defendants. The defendants claimed that they were not purchasers of the wheat, but bailees thereof, and claimed that the wheat received from R., being in storage only, should bear its proportion of the loss of wheat resulting from the fire. The Circuit Court judge on the trial, in effect, sustained this contention, and refused to direct the jury that if the contract were that the defendants were to pay for the wheat at the market price whenever R. should name the time of the market price therefor, and that the defendants had the right to use the wheat as they thought proper, then such contract was a sale of the wheat and not a bailment. The jury, by their finding, sustained the defendants' contention, under the instruction of the court that the law of the case compelled a finding of a bailment of the wheat and not a sale. The Supreme Court of Virginia held (Lewis,

P., dissenting), that the instruction asked for was improperly refused, and the instruction given was wrong; that the receipt, construed in the light of the surrounding facts, and according to the accurate exposition of the law as laid down in *Powder Company v. Burkhardt*, 97 U. S. 110 (stated *supra*), showed a sale and not a bailment; and they set aside the verdict, reversed the judgment, and ordered a new trial. In a recent Illinois case (June 13, 1887), *Handwerk v. Oswood*, 23 Ill. App. 262, very much as in *Reherd's Adminstr. v. Clem*, 86 Va. 374, grain was delivered to M., the plaintiff's assignor, by the defendants, under an agreement that they should be allowed to come in at some future day and select a market price at which the grain should be settled for. The court held that the transaction was a sale and not a mere bailment, and that the title to the property vested in M., and all that remained to be done was for the defendants to fix the price of the grain under the option given them, by designating on some future day the market price of that day as their selection (*Louergan v. Stewart*, 55 Ill. 44; *Ives v. Hartley*, 51 Ill. 520; *McEwen v. Morey*, 60 Ill. 32); and that this option must be exercised within a reasonable time; and if, on demand, it was not so exercised, the other party to the agreement could himself fix the day, and notify the other parties accordingly. See *Hubbell v. Von Schœning*, 49 N. Y. 326; *Hapgood v. Shaw*, 105 Mass. 276; *Bank v. Hagner*, 1 Peters, 455, 465; *Nelson v. Plimpton, & Co.*, 55 N. Y. 480; *Turner v. Mellier*, 59 Mo. 526; *Lyon v. Culbertson*, 83 Ill. 33; *Doggett v. Brown*, 28 Ill. 493.

In *Prichett v. Cook*, 62 Pa. 193, the plaintiffs delivered C. a quantity of hides under a contract that he was to have them at the regular cash prices; to tan them, and return the leather to the plaintiffs, who, after deducting the price of hides, commission, interest, and other current expenses, were to credit C. with the balance. Different lots of hides were furnished C. by the plaintiffs, to the bill or invoice of each lot C. signing a memorandum to the effect that the right of ownership in the hides was to be and remain in the plaintiffs; C. agreeing to return the entire amount of leather produced from the hides. Some of the hides having been taken in execution against C.; under an interpleader, it was contended, on the authority of an expression in *Williamson v. Berry*, 8 How. 544, that "a sale is a contract to pass the right to property for

funds for expenses of manufacture, etc., and was also to furnish materials for the manufacture, or money to purchase them, which

money, to be paid by the buyer to the seller," that no property in the hides had passed to C. But the court held that in all essential particulars the transaction was a sale of the hides. The court said: "The hides were either the plaintiff's all the while, notwithstanding they were charged to C. and delivered to him, or they were delivered on a sale on credit, and a contract for resale when tanned. The plan of the parties was sufficiently disclosed in the contract, to have been to give to him the advantage and credit of an owner, without the liability as owner to have it seized by creditors. Had there been nothing of this in view, no one would have hesitated a moment in pronouncing the transaction a sale. The hides were charged, the debt or price to bear interest, and when leather was returned it was to be sold by the plaintiff's charging commissions for sales and guaranty and expenses, and crediting the proceeds to the defendant's account. It would be strange to hear of a man charging interest against his own goods, and more strange to charge commissions for sales and guaranties of sales of them." The court held that the contract was that of a sale and not of a bailment. *Jenkins v. Eichelberger*, 4 Watts, 121, under a very similar state of facts, is to the same effect.

The Illinois Court of Appeals, in the recent case (October, 1885), of *Bastress v. Chickering*, 18 Ill. App. 198, acted on the principle laid down and established by *Loneragan v. Stewart*, 55 Ill. 49; *Richardson v. Olmstead*, 74 Ill. 213, and other cases we have above examined, as the well-settled law of the State, that when the identical thing delivered is to be restored in the same or an altered form the contract is one of bailment, and the title to the property is not changed; but when there is no obligation to restore the specific article, and the receiver is at liberty to return another article of equal value, he becomes a debtor to make a return and the title to the property is charged: it is a sale. In this case the plaintiffs contended that they had consigned pianos to P. and Co., and that the consignments were bailments and not sales. By the agreement between the parties, P. & Co. were to sell the pianos at their own prices, and were to have all they could get for them over the invoice prices, and as they sold them they were to remit to the plaintiffs the invoice prices of the pianos; but it was in effect stated, that the plaintiffs were to remain the owners. In the bill or invoice of the pianos, P. & Co.

were charged with the price of the pianos in the usual form of a bill of goods sold, but across the bill was written the word "consigned." At the end of each month P. & Co. sent their promissory notes to the plaintiffs for all the pianos received during the month, as they had been in the habit of doing when purchasing pianos prior to the agreement. The Court of Appeal held, affirmed on a rehearing, and reversing the judgment of the Superior Court, that while the form of agreement was that of consignment for sale, its real purpose was to cover up a sale, and preserve in the plaintiffs a lien for the price of the pianos; and that the agreement was void as against execution creditors. So, in *Rose v. Story*, 1 Barr, 190, the court says: "If the vendor and vendee agree that the possession shall pass to the vendee, but the property remain in the vendor until the purchase-money is paid, such agreement, as respect creditors and the sheriff, is fraudulent. By transferring the possession to the vendee under such a contract a false credit is given to the vendee, and therefore, in respect of third persons, as he is the apparent so he is to be considered the real owner." And, in *Thompson v. Parct*, 94 Pa. 275: "Whatever the form of the agreement, if its purpose was to cover up a sale, and preserve a lien in the vendors for the price of the goods, it was void as respects creditors, whether the credit was given before or after the delivery of the goods. A consignment for such an object is no better than any other device.

In *Jenkins v. Eichelberger*, 4 Watts, 121, the agreement for consignment was held to be merely colorable, and the transaction a sale and not a bailment. The doctrine of the cases is that where one party, by means of contract, but without notice to the world, suffers the ostensible ownership to be in another, while claiming the real ownership in chattels to be in himself, the law will postpone his rights to those of the execution or attachment creditors of the ostensible owner, because, to injure third persons by giving a false credit to such ostensible owners, is the natural and probable result of the transaction. *Murch v. Wright*, 46 Ill. 487; *Hervey v. R. I. Loco. Works*, 93 U. S. 644; *Heryford v. Davis*, 102 U. S. 235; *Fish v. Benedict*, 74 N. Y. 613; *Martin v. Mathiot*, 14 S. & R. 214; *Stadfield v. Huntsman*, 92 Pa. 53; *Brunswick v. Hoover*, 10 Weekly Not. of Cas. 219.

And where the transaction is colorable, and the object of the consignor is to sell

were to be charged to Dittmar against the manufactured goods to be consigned to the plaintiffs. The question arose between the

the article and retain a lien on it severed from the possession, the transaction will be held to be a sale and not a bailment. *Jenkins v. Eichelberger*, 4 Watts, 121. Where, however, the consignment is found to be *bona fide*, and the property in the goods remains in the consignor, the transaction will not be deemed a sale merely because the consignee is allowed all the advance on goods he may obtain over their invoice price, the loss by sale or by fire being in the consignor. *McCullough v. Porter*, 4 W. & S. 177. And in *Wheeler & Wilson Manuf. Co. v. Heil*, 115 Pa. 487, where the question arose between the parties to the contract, where there was a letting by the plaintiffs of a sewing-machine, to the defendants, for \$10 paid, and a monthly rental to be paid for fourteen months, on the payment of which rental and \$1 purchase-money the plaintiffs were to sell and deliver the machine by a good and sufficient bill of sale to the defendants; the property until the \$1 was paid to remain in the plaintiffs; the court held, that, as between the parties to the agreement, the transaction was to all intents and purposes a bailment and not a sale. See *Edwards' Appeal*, 105 Pa. 103; *Dando v. Foulds*, 105 Pa. 74; *Forrest v. Nelson*, 108 Pa. 481; *Enlow v. Klein*, 79 Pa. 488; *Rowe v. Sharp*, 51 Pa. 30; *Stadtfeld v. Huntsman*, 92 Pa. 53; *Haak v. Linderman*, 64 Pa. 497. But in *Wire Book-Sewing Mach. Co. v. Crowell* (17 January, 1887, in the Supreme Court of Pennsylvania), 8 Atl. Rep. 22, where the question was between the plaintiffs and an execution creditor of N., where the plaintiffs delivered N. a machine, taking his promissory notes for the full price of the machine, with a provision that when the notes were paid, a bill of sale would be given N. for the machine; the property meantime remaining in N.; it was held, that it was a clear case of conditional sale on credit, followed by a delivery of possession, with a provision to convert the sale into a bailment if the price of the machine should not be paid, and that the effect of this provision was not sufficient to convert the contract into a bailment *ab initio*. We consider the question of apparent possession fully in a later volume of this work. See further on conditional sales, *Carleton v. Sumner*, 4 Pick. 516; *Smith v. Dennie*, 6 Pick. 562; *Leven v. Smith*, 1 Denio, 571; *Dresser Manuf. Co. v. Waterston*, 3 Met. 9; *Farlow v. Ellis*, 15 Gray, 229; *Goodwin v. Boston, &c. Ry. Co.*, 111 Mass. 487; *Scudder v. Bradbury*, 106 Mass. 422; *Haskins v. Warren*, 115

Mass. 514; *Freeman v. Nichols*, 116 Mass. 309; *Bowen v. Burk*, 13 Pa. St. 146; *Mixer v. Cook*, 31 Me. 340.

In an Ontario case, *Moore v. Sibbald*, 29 U. C. Q. B. 487, the defendant gave \$20 for a colt in his possession, to the plaintiff, under an agreement that he would give the colt back to the plaintiff on payment of \$20 and twelve *per cent*, on or before a named date, with a provision that if the same were not paid, the defendant could do as he pleased with the colt. Plaintiff paid \$15, but, paying nothing more, the defendant, after the date named, sold the colt. The court held that the transaction was a sale with a right of re-purchase, and as it was not exercised by the named date, the right was gone, and trover would not lie, but that the plaintiff was entitled to a re-payment of the \$15 as money had and received. See *Milgate v. Kebble*, 3 M. & G. 100; *Williams v. Owen*, 5 Myl. & Cr. 303; *Barrell v. Sabine*, 1 Vern. 268; *Mellor v. Lees*, 2 Atk. 494; *Sevier v. Greenway*, 19 Ves. 413; *Perry v. Meadowcroft*, 4 Beav. 197; *Davis v. Thomas*, 1 Russ. & Myl. 506. So, in *Pomey v. Camors*, 36 La. Ann. 464 (A. D. 1884), where securities were transferred by the plaintiff to the defendants as absolute owners, to meet an indebtedness, with a subsequent agreement to allow the plaintiff to redeem them within a named time; the court held that the contract was one of sale and giving in payment, modified by an agreement of the right of redemption in favor of plaintiff, to be exercised within a specified time; and not a bailment or pledge; and that, as the right of redemption was not exercised within the prescribed time, the defendants then became the absolute owners of the securities. But in *Enlow v. Klein*, 79 Pa. 488, the doctrine was laid down that where by a contract the vendee receives a chattel which he is to keep for a certain period, and if in that time he pays for it the stipulated price, he is to become the owner, but if he does not pay the price, he is to pay for its use, the transaction is a bailment and not a sale, the right of property not being changed until the price is paid. In this case a team was let by the plaintiff to M., at \$5 weekly, until two hundred such payments to be made, the property in the mean time to belong to and to be managed by the plaintiff, who, on the last payment, was to relinquish his title in the property to M. The court held that the property would only vest in M. when the last payment was made. *Clark v. Jack*, 7 W. &

plaintiffs and the purchaser, under an execution against Dittmar, of materials furnished to Dittmar, or purchased by funds received

S. 375; *Lehigh Co. v. Field*, 8 W. & S. 232; *Henry v. Patterson*, 57 Pa. 346; *Becker v. Smith*, 59 Pa. 469. *Enlow v. Klein*, 79 Pa. 488, was distinguished from *Martin v. Mathiot*, 14 S. & R. 214, on the ground that there possession was delivered to the vendee in pursuance of a sale actually made, with the condition added that the title to the chattels sold should remain in the vendor until the purchase-money should be paid, and it was held, as to the creditors of the vendee, that the property had passed. In the one case it was held that there was a sale, under which the title to the chattel passed; in the other, that there was no transmission of the property in the chattel. Thus, in *Chamberlain v. Smith*, 44 Pa. 431, where M. received from the plaintiff an ox-team, "to keep and work in a reasonable farmer-like manner" for one year, the team to be then returned; but M. having the privilege, by paying \$40, and legal interest, at the expiration of the year, of keeping the cattle. Before the expiration of the year, and without paying the \$40, M. sold the cattle. The Supreme Court of Pennsylvania held, reversing the judgment of the Circuit Court, that the property in the cattle had not passed to M., and that the sale was invalid. They said: "Here was no contract of sale, which is an agreement of both parties that the property shall pass from one to the other for a consideration given or promised to be given. At most, there was an agreement to sell at a future time, or rather an offer to sell, with time given for its acceptance. The transfer of possession also was not in pursuance of a sale. M.'s right to the possession grew out of the letting, therefore no false credit was given. The delivery is accounted for without the necessity of attributing fraud, and the possession of M. was consistent with ownership in the plaintiff."

So in the very late Pennsylvania case (A. D. 1886) of *Kant v. Kessler*, 114 Pa. 603, where the plaintiffs bought stock, fixtures, etc., for a house of entertainment rented by B., for the rental of which the plaintiffs were sureties; B. contributing nothing to the business, and agreeing to carry it on in the name of "B., agent;" the stock, fixtures, &c., "to be the sole property and belonging" of the plaintiffs; B. to pay the rent, taxes, and gas bills, and to buy from the plaintiffs all the beer he required at \$10 per barrel, \$2 per barrel of which, being in excess of the market price, was to be credited on a judgment given by B. to the plaintiff. B. bought

his stock of liquors from the defendants, for which he gave them his note; and expended about \$1100 of his own money in fitting up the building. The defendants, having obtained a judgment against B., levied on the stock, fixtures, etc. The plaintiffs claimed the ownership therein. On the trial of a feigned issue in the Common Pleas, the court instructed the jury that if they found that the property delivered by the plaintiffs to B. was at a future time to be sold and transferred to him, if he should repay to them an amount equal to the value of the property, that was a bailment and not a conditional sale; or if they should find B. received the goods from the plaintiffs, to retain them for a definite period, to become the owner of them if he paid for them during that period, otherwise to pay for their use, then the transaction was a bailment, and the title remained in the plaintiffs. The jury having found for the plaintiffs, the Supreme Court, on error, sustained the instructions and the finding, and also held that the written contract could not be regarded as a sale in any view that could be taken of it. After a reference to its contents, they said: "In all this there is not a provision, not a word, looking to the acquisition of title by B. to the property in question at any time or in any manner. The title which is already in the plaintiffs remains in them, and cannot be divested by the execution of any of the terms of the contract. Both in form and in substance the contract is nothing but a bailment. The cases cited for the defendants have no analogy to this because they all contained provisions by which a passage of the title was provided for, but here there is nothing of the kind. We cannot possibly say that this instrument shall have the character and effect of a sale, when there is no part of it which can in any event give a right of purchase, or impose an obligation of sale." *Houser v. Kemp*, 3 Pa. St. 208; *Lester v. McDowell*, 18 Pa. St. 91; *Sneathen v. Grubbs*, 88 Pa. 147; *Clark v. Jack*, 7 Watts, 375; *Henry v. Patterson*, 67 Pa. 346. Where the property passed, see *Stadtfield v. Huntsman*, 92 Pa. 53; *Brunswick, & Co. v. Hoover*, 95 Pa. 508; *Boynton v. Isaacs*, 10 Weekly Not. Cas. 190.

In *Kant v. Kessler*, 114 Pa. 603, no question seems to have been raised on the point as to the effect of the execution on the "wines" and "liquors," purchased by B. himself from the defendants, and which were no part of the stock conveyed by the plaintiffs to B. The point which we here

by him from the plaintiffs. It was contended for the plaintiffs and conceded by the court that the question of bailment or not is determined by the fact whether the identical article delivered to the manufacturer is to be returned to the party making the advance.¹ Thus where logs are delivered to be sawed into boards or leather to be made into shoes, rags into paper, olives into oil, grapes into wine, wheat into flour, if the product of the identical articles delivered is to be returned to the original owner in a new form, it is said to be a bailment, and the title never vests in the manufacturer. If, on the other hand, the manufacturer is not bound to return the same wheat, or flour, or paper, but may deliver any other of equal value, it is said to be a sale or a loan, and the title to the thing delivered vests in the manufacturer.² The court held that the materials delivered Dittmar were in his actual

make, was made by the court in *Morss v. Stone*, 5 Barb. 516, 519. In this case, the main point decided was, where a pedlar received goods from the plaintiff to sell and account for to him, or return the same as good as when taken, with interest, that this was a bailment and not a sale; and that the goods were not subject to an execution against the pedlar at the suit of a third party. But, as the pedlar had received a bill of goods from the plaintiff, for which he had given his note, the court held that the question should have been left to the jury whether any of these were among the goods seized under the execution; and, if so, they were properly seized as the goods of the pedlar. This case, on the main point, was distinguished from *Marsh v. Wickham*, 14 Johns. 167, where there was a sale of the goods, with a privilege of return. In this case the defendants (the vendees) expressly agreed to pay a named price for the goods, which showed a sale. But, in *Crosby v. The Delaware, &c. Canal Co.*, 119 N. Y. 334 (A. D. 1890), where parties received goods, accompanied with an account or bill of parcels, in the usual form, specifying the quantities, prices, and descriptions of the goods furnished, as the facts left it doubtful whether the goods were received as a bailment or a sale, the court held that this was a question to be submitted to the jury, and ordered a new trial for that purpose. In *Moses v. Taylor*, 6 Mack. (D. C.), 255, 273, it was held (A. D. 1888) that a delivery or loan of chattels, with the right of the bailee to appropriate them to his own use and pay the value, is a bailment convertible into a sale at the election of the bailee; and that on the bailee electing to appropriate the goods to his own use, assumpsit for goods sold and delivered would lie, as from the time of the election.

Bayley v. Gouldsmith, Peake, 56; *Bianchi v. Nash*, 1 M. & W. 545. See *Bromley v. Coxwell*, 2 B. & P. 438; *Catlin v. Bell*, 4 Campb. 183; *Hunter v. Welsh*, 1 Stark. 224; *Lyons v. Barns*, 2 Stark. 39; *Studdy v. Sanders*, 5 B. & C. 628. But, where bonds were received from the plaintiff, by the defendant, "to be returned on call," and, as collateral security, the defendant gave his notes with interest, for the amount of the bonds, this was held to be but a bailment of the bonds, and not to give the defendant any election to treat it as a sale. *Moses v. Taylor*, 6 Mack. (D. C.) 255. See *Coquand v. Wemse*, 100 Mo. 137 (A. D. 1889); *Bulkley v. Andrews*, 39 Conn. 70. Where there is the right of election, as the statute of limitations only runs from the time the right of action accrues, it would only begin to run at the time the right of election was exercised; and where there is no right of election, and a conversion, the action of trover would only accrue at the time of the conversion. See *Lovell v. Martin*, 4 Taunt. 799; *Bristol v. Burt*, 7 Johns. 254; *Moses v. Taylor*, 6 Mack. 255; *Cole v. Hebb*, 7 Gill & J. 20; *Callis v. Tolson*, 6 Gill & J. 80; *Planters' Bank v. Farmers' Bank*, 8 Gill & J. 449; *Abell v. Harris*, 11 Gill & J. 367; *Fell's Point Sav. Inst. v. Weedon*, 13 Md. 320; *Boughton v. Flint*, 74 N. Y. 481; *Kane v. Cook*, 8 Cal. 419; *Union Bank v. Planters' Bank*, 9 Gill & J. 461; *Farmers' Bank v. Planters' Bank*, 10 Gill & J. 441. And see *ante* p. 14, n. 1. And see, also, *ante* pp. 24-27, and notes.

¹ See *ante*, p. 14, n. 1.

² *Pierce v. Schenck*, 3 Hill (N. Y.), 28; *Norton v. Woodruff*, 2 N. Y. 153; *Mallory v. Willis*, 4 N. Y. 76; *Foster v. Pettibone*, 7 N. Y. 433; *South Australian Insurance Co. v. Randall*, L. R. 3 P. C. 101; *Barker v. Roberts*, 8 Me. 101; *Smith v. Jones*, 7

possession and under his absolute control; that there was nothing in the agreement that the identical materials delivered to him should be used in the manufacture of the *dualin*, and nothing to prevent an exchange by Dittmar for other materials, if he found any of the articles to be unsuitable, or if he found that he had too much of one kind and too little of another, acting honestly in the interest of both parties; the case being quite different from the single mechanical transaction of turning a specific set of logs into boards, or a specific lot of wheat into flour, where there is no room for judgment or discretion. The goods *in specie* and the money supplied became the property of Dittmar, for which he was liable to account to the plaintiffs as for so much in value to be charged against the manufactured goods which were to be consigned to the plaintiffs. The goods, therefore, were subject to an execution against Dittmar.¹

The distinction between a sale and a bailment is, of course, important. As but a special property is vested in the bailee, his rights and duties with respect to the property bailed with him are necessarily essentially different from those of an owner of the property under a sale. The following cases sufficiently illustrate this point: —

S. & Co. were the owners of the corn-exchange elevator of Oswego, N. Y., in which they were engaged in the general business of elevating and storing grain for the public, and were also large dealers in grain on their own account. They sent orders to M. & Co., commission merchants in Milwaukee, to purchase for them two cargoes of wheat, and to draw on them for the purchase-money against each cargo. M. & Co. bought and shipped the cargoes, and drew for the purchase-money on S. & Co., part in sight-drafts, and part in time-drafts, selling these drafts to the plaintiffs; the bills of lading being made in favor of the plaintiffs. The plaintiffs forwarded the drafts with the bills of lading to the defendants, and instructed them to deliver the cargoes to S. & Co. if the drafts were paid, but if not paid, to hold the cargoes and advise by telegraph. S. & Co. paid the sight-drafts and accepted the time-drafts. On the arrival of the cargoes at Oswego, the cashier of the defendants indorsed the bill of lading, making the cargoes deliverable to the corn-exchange elevator, for account of the plain-

Cow. 328; Hyde v. Cookson, 21 Barb. 92; King v. Humphreys, 10 Pa. St. 217; Stevens v. Briggs, 5 Pick. 177; Denny v. Cabot, 6 Met. 82; Judson v. Adams, 8 Cush. 556; Schenk v. Saunders, 13 Gray, 37; Mansfield v. Converse, 8 Allen, 182; Bufferm v. Merry, 3 Mason, 478.

¹ See also Dittmar v. Norman, 118 Mass. 319, where the question arose under the same agreement, and where the Supreme Court of Massachusetts held, as in this case, that the transaction was a sale and not a bailment.

tiffs, subject to the order of the defendants. S. & Co., sold and shipped the wheat after it had been put in their elevator, and shortly thereafter failed. The time-drafts not having been paid, the plaintiffs sued the defendants to recover the loss on the drafts, caused by the delivery of the wheat to S. & Co. without the drafts having been paid. The jury, by direction of the court, having found for the defendants, the United States Supreme Court, on error, held¹ that the defendants, having undertaken the business for plaintiffs, became their agents, and as such were bound to use due care and diligence in performing the task which they had undertaken; that whether such care and diligence had been used was a question for the jury, and if the jury should find that the delivery to the corn-exchange elevator, of which S. & Co. were the proprietors, when the wheat might have been delivered to another elevator without complicating the question of ownership with that of bailment, and which would have prevented the loss, and would not have involved a departure from their instructions, was negligence, then the defendants would be responsible to the plaintiffs for the amount of the unpaid drafts, less any sum actually recovered from the parties who bought or received the wheat from S. & Co. A new trial was ordered accordingly.

Tobacco was in the hands of the defendants, commission merchants, as bailees for G. The tobacco was seized for breach of the revenue laws. As it deteriorated by keeping, by an agreement between the collector of internal revenue and the bailees, the tobacco was sold by the latter, the proceeds thereof to be retained by them until a suit which was brought to have the tobacco condemned, had been decided. The suit was defended by G., and was dismissed by the district attorney after plea filed. The defendants retained the money for nearly four years, when, no other proceedings having been instituted, and no demand made on them, they paid over the money to G. In an action against them for the money, the Circuit Court held that they were liable. But the United States Supreme Court reversed this decision, and held that as they held the money, not as principals, but as bailees, they had but performed their duty in paying the money over, after having held it for a reasonable time without further proceedings having been taken in the matter, or demand made upon them.²

The kind of bailment known as a pledge, accompanied as it very generally is by an express or implied power of sale, involves in some respects the rights, powers, and duties of an absolute owner

¹ National Bank v. City Bank, 113 U. S. 668.

² Pettigrew v. United States, 97 U. S. 385.

of the property, yet there are still very marked distinctions existing between the two. The question will be found to be considered in a case, under the Bills of Lading Act. On appeal to the House of Lords,¹ where the judgment of the Court of Appeals in the case was reversed, the House of Lords held that the mere indorsement and delivery of a bill of lading by way of pledge for a loan, does not pass "the property in the goods" to the indorsee, so as to transfer to him all liabilities in respect of the goods within the meaning of the Bills of Lading Act, so as to make him liable in an action by the shipowner for the freight. After a most elaborate examination of the authorities by Lord Selborne, that able judge reached the following conclusion: "Upon the whole, I cannot dissemble that this case appears to me attended with some considerable difficulties. But these difficulties are mainly technical, arising out of a comparison of the language of the statute with various and not always consistent forms of expression found in authorities not decided with a view to any such consequences as those which the statute would produce. They deal with questions between unpaid vendors of goods comprised in bills of lading and *bona fide* indorsees of the same bills of lading for value, or between competing and adverse claimants to priority as *bona fide* holders for value of the bills of lading themselves. The statute, on the other hand, deals with questions between shippers and indorsees of bills of lading claiming under them, and between indorsees and shipowners. The preponderance of principle and reason appears to me to be against the proposition that, as between those parties, it can have been intended by, or can be the effect of the statute, to make the creditor of the shipper liable (in effect) as his surety to the shipowner (with whom he was never brought in contract) by reason only of the deposit with him by way of security of a bill of lading indorsed in blank; his right under that deposit being (whether at law or in equity) special and not general, and the shipper retaining (whether at law or in equity) the real and substantial property in the goods, subject to the security. It had not, until the present case, been directly or indirectly determined by any authority that such is the effect of the statute."²

¹ Sewell v. Burdick, 10 Ap. Cas. 74.

² Lord Fitzgerald, in a very few words, sums up the whole argument in the case thus: "Field, J., in the court below, came to the conclusion that the transaction under investigation was intended by the parties to operate as a pledge only. There can be no doubt that the inference thus drawn by the learned

judge was correct in fact. It seems to follow that the pledgees acquired a special property in the goods, with a right to take actual possession, should it be necessary to do so for their protection or for the realization of their security. They acquired no more, and subject thereto the general property remained in the pledgor. I am of opinion that the delivery of the in-

The following are also instructive cases in the law of pledge, as distinguished from the law of sale, covering all the points necessary for our purposes. For a fuller consideration of the law relating to pledges, the student is referred to the text-books on bailments and contracts.

A holder of scrip certificates for shares borrowed of the defendant a sum of money on his own promissory note, payable on demand, and on the security of the shares, and deposited with the defendant the scrip certificates. He afterwards became bankrupt, and the defendant, without demand and without notice, sold ten of the fifteen shares to repay himself his debt. The creditor's assignee, without making any tender of the amount of the debt, brought an action of trover against the defendant to recover the value of the shares. The Court of Exchequer Chamber held, affirming the decision of the Court of Exchequer, that, even assuming the sale to be wrongful, the immediate right to the possession of the shares was not, by the sale, revested in the plaintiff, and that he could not maintain trover, either for the whole value of the shares or for nominal damages.¹

dorsed bill of lading to the defendants, as a security for their advance, did not, by necessary implication, transfer *the* property in the goods to the defendants. They were not, therefore, 'indorsees of a bill of lading to whom *the* property in the goods passed by reason of the indorsement,' so as to make them without more 'subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with them.'" *Ibid.*, at p. 105.

¹ In following the decision of the Queen's Bench in *Donald v. Suckling*, L. R. 1 Q. B. 585, the law is thus succinctly laid down by the court: "There are three kinds of security: the first, a simple lien; the second, a mortgage, passing the property out and out; the third, a security intermediate between a lien and a mortgage, viz., a pledge, where, by contract, a deposit of goods is made a security for a debt, and the right to the property vests in the pledgee as far as is necessary to secure the debt. It is true the pledgor has such a property in the article pledged as he can convey to a third person, but he has no right to the goods without paying off the debt, and until the debt is paid off the pledgee has the whole present interest. If he deals with it in a manner other than is allowed by law for the payment of his debt, then, in so far as by disposing of the reversionary interest of the pledgor he causes to the pledgor any difficulty in obtaining possession of

the pledge on payment of the sum due, and thereby does him any real damage, he commits a legal wrong against the pledgor. But it is a contradiction in fact, and would be to call a thing that which it is not, to say that the pledgee consents by his act to revest in the pledgor the immediate interest or right in the pledge which, by the bargain, is out of the pledgor and in the pledgee. Therefore, for any such wrong an action of trover or detainue, each of which assumes an immediate right to possession in the plaintiff, is not maintainable, for that right clearly is not in the plaintiff." *Halliday v. Holgate*, L. R. 3 Ex. 299, 302.

In *Coggs v. Bernard*, 2 Ld. Raym. at p. 916, Holt, C. J., says: "As to the property the pawnee has in the pawn or pledge, he has a special property, for the pawn is a securing to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him." See *Ryall v. Rolle*, 1 Atk. 167; *Reeves v. Capper*, 5 Bing. N. C. 140. In *Bell's Commentaries*, B. 2, ch. 6, § 2, it is said: "By pledge, a movable subject, or the title deed, vouchers or muniments of a debt or *jus incorporale* are delivered to the creditor, in security of debt, to remain with him, and be detained in possession till the debtor shall redeem them; and, if necessary, to be sold by judicial authority for satisfaction of the debt; the creditor engaging to restore the thing pledged when the debt shall be paid." In *Donald*

A bailee of goods who holds them as a pledge has a special property which can be sold and assigned. The assignee in such cases becomes invested with all the legal rights which belonged to the assignor. Such is the rule of the common law, and it has subsisted from an early period.¹ The law was so applied by the United States Supreme Court in the case of the sale and assignment of gold certificates.²

v. Suckling, L. R. 1 Q. B. 585, A. deposited debentures with B. as security for the payment, at maturity, of a bill endorsed by A. and discounted by B., on the agreement that B. should have power to sell or otherwise dispose of the debentures if the bill should not be paid when due. Before the maturity of the bill, B. deposited the debentures with C., to be kept by him as a security until the repayment of a loan from C. to B. larger than the amount of the bill. The bill was dishonored, and while it still remained unpaid, A. brought detinue against C. for the debentures. It was held that the repledge by B. to C. did not put an end to the contract of pledge between A. and B., and B.'s interest and right of detainer under it; and that A., therefore, could not maintain detinue without having paid or tendered the amount of the bill. The question raised by this case is, whether a pawnee of debentures, deposited with him as a security for the due payment of money at a certain time, does, by repledging such debentures, and depositing them with a third person as a security for a larger amount, before any default in payment by the pawnor, make void the contract upon which they were deposited with the pawnee, so as to vest in the pawnor an immediate right to the possession thereof, notwithstanding that the debt due by him to the original pawnee remains unpaid. Although there are *dicta* otherwise, we think there is no question that *Donald v. Suckling*, L. R. 1 Q. B. 585, was well decided. The true principle would seem to be that, although a pledgee cannot confer upon any third person a better title or a greater interest than he possesses, yet, if nevertheless he does pledge the goods to a third person for a greater interest than he possesses, such an act does not annihilate the contract of pledge between himself and the pawnor; but the transaction is simply inoperative as against the original pawnor, who, upon tender of the sum secured, immediately becomes entitled to the possession of the goods, and can recover in an action for any special damage which he may have sustained by reason of the act of the pawnee in repledging the goods. *Per Mellor, J.*, in *Donald v. Suckling*, 1 Q. B.,

at p. 610. A pledge is distinguished from a mere lien, inasmuch as this latter is a mere personal right of detention. In *Daubigny v. Duval*, 5 T. R. at p. 606, the case was put on the ground that a lien is a personal right and cannot be transferred to another. In *Johnson v. Stear*, 15 C. B. N. s. 330, goods, which had been pledged as security for the payment of a bill of exchange, having been sold before the falling due of the bill, it was held, in an action of trover to recover the goods, that, although the owner was entitled to maintain an action against the pawnee for a breach of contract in parting with the goods, yet that the contract itself was not put an end to by the tortious dealing with the goods by the pawnee, so as to entitle the owner to bring an action to recover the goods as if the contract had never existed. For further authorities see *Jarvis v. Rogers*, 15 Mass. 389; *Ibid.* 13 Mass. 107; *Ratcliff v. Davis*, Yelv. 178; *Demainbray v. Metcalfe*, 2 Vern. 691, 698; *McCombie v. Davies*, 7 East, 6; *Paterson v. Tash*, 2 Str. 1178; *Ex parte Deeze*, 1 Atk. 228; *Lee v. Atkinson*, Yelv. 172; *Bloxam v. Sanders*, 4 B. & C. 941; *De Bouchot v. Goldsmid*, 5 Ves. 211; *Hartop v. Hoare*, 3 Atk. 52; *Pigot v. Cubley*, 15 C. B. N. s. 701; *Chinery v. Viall*, 5 H. & N. 288; *Brierly v. Kendall*, 17 Q. B. 937; *Peters v. Hayward*, Cro. Jac. 682; *Legg v. Evans*, 6 M. & W. 36; *Potharier v. Dawson*, Holt N. P. 385; *Milgate v. Keble*, 3 M. & G. 100; *Fenn v. Bittleston*, 7 Ex. 152; *Green v. Farmer*, 4 Burr. 2214.

¹ *Mores v. Carham*, Owen (K. B.), 123; *Anon.*, 2 Salk. 522; *Coggs v. Bernard*, 3 Salk. 268; *Whitaker v. Sumner*, 20 Pick. 399, 405; *Thompson v. Patrick*, 4 Watts, 415.

² *Merchants' Bank v. State Bank*, 10 Wall. 604, 643.

The law as decided in the recent cases of *Donald v. Suckling*, L. R. 1 Q. B. 185, and *Halliday v. Holgate*, L. R. 3 Ex. 299, is not at all different from the law as laid down in the old cases we have cited from Owen and Salkeld. In *Thompson v. Patrick*, 4 Watts, 415, in an action of trover for the value of a sleigh and harness, the court, following these old cases, then laid

On the principle that a power to sell does not include a power to pledge, where a power of attorney gave to the holders authority "for the purposes aforesaid to sign for me, and in my name, and on my behalf, any and every contract or agreement, acceptance, or other document;" the purpose aforesaid being "from time to time to negotiate, make sale, dispose of, assign, and transfer" government promissory notes, and "to contract for, purchase, and accept the transfer of the same;" the privy council held, that upon the true construction of this power, the holders were authorized to sell or purchase such notes, but not to pledge them.¹

Where there is a power by law to sell, a purchaser may obtain from the vendor, even as against the true owner, a good title, but that cannot extend by implication to a pledge.

Barrow was a leather merchant in London; Bonnell was a tanner in Canada. Barrow agreed to pay Bonnell 1½*d.* per pound for every hide tanned by Bonnell in the mode of the country, and Bonnell was to procure freight and send back the hides. Barrow sent out a large number of the hides; they were tanned and freight was procured for them; but in the mean time Bonnell had obtained from the Toronto Bank advances on his own account on bills, and hypothecated the hides to the bankers as security for such advances, engaging to hand over to them the bills of lading if his bills of exchange were not duly honored. They were not duly honored, and the bankers (who had acted in entire

down the law substantially as it has been done in the late cases named, thus: "As a pawnor has a special property in the thing pawned, he may assign it; and his assignee may consequently assert his title to it against the owner, or one standing in his place. He may even use the pawn, provided it be not the worse for it, if the keeping of it be a charge to him; in recompense of which he may, for instance, milk a cow or ride a horse. But though it be not the worse for it, he can use it but at his peril; for a pawn is in the nature of a deposit, and, in the case indicated, the loss of it is attributable to the wearing of it, which put it in the way of danger. He is consequently answerable for damage occasioned by his use of it. But though he use it even tortiously he is answerable for the consequences but by action." His lien still remains intact.

¹ *Jonmenjoy Coondoo v. Watson*, 9 Ap. Cas. 561. In the case of the *Bank of Bengal v. Macleod*, 5 Moo. Ind. Ap. 1; 7 Moo. P. C. 35, under very similar language, the construction was otherwise. But the two cases are perfectly reconcilable on the ground that the language in the two cases, construed

with the context in the respective cases, gave an authority in the one case that was not created in the other. See further, *Bank of Bengal v. Fagan*, 5 Moo. Ind. Ap. 27; *De Bouchot v. Goldsmid*, 5 Ves. 211; *Wilson v. Moore*, 1 M. & K. 337; *Irland v. Livingstone*, L. R. 5 H. L. 395; *Taylor v. Kymer*, 3 B. & Ad. 320; *Atwood v. Mullings*, 7 B. & C. 278; *Goodwin v. Roberts*, 1 App. Cas. 476; *Glyn v. Baker*, 13 East, 509. If an agent to whom goods are intrusted for a particular purpose, make sale of the goods in a manner or to a person not within the scope of his authority, the principal may disaffirm the sale, and recover the goods of the vendee. *Peters v. Ballastier*, 3 Pick. 495; *Wilkinson v. King*, 2 Campb. 335; *Baring v. Corrie*, 2 B. & Ald. 137; *McCombie v. Davies*, 6 East, 538; 7 East, 7. But a principal is bound by the act of his agent in disposing of his property where the latter is furnished with the external *indicia* of right to dispose of it, notwithstanding that he may have deviated from the secret instructions of his principal. *Commercial Bank of Buffalo v. Kortright*, 22 Wend. 348.

ignorance of the transactions between Barrow and Bonnell) claimed to retain the bills of lading and the hides until their demands were satisfied. On the trial, Lindley, J., held that Bonnell was not an agent within the English Factors Act nor within a similar act in the Province of Quebec, but that as a pledge by the apparent owner of the goods under the law of that province, for valuable consideration, the defendants (the bankers) were entitled to the goods. The Common Pleas division sustained this decision, which was reversed by the Court of Appeal. On appeal, this decision was affirmed by the House of Lords, which held that neither under the English Act nor the Canadian Act had one in the position of Bonnell the power by pledging to pass the property in the goods, which he could not under the circumstances of this case have done by a sale.¹

In an action by the pledgor against a *bona fide* purchaser of property pledged, it was held that the action could not be maintained where there had been no payment to the purchaser, or tender of the amount due by the pledgor on the pledge. A tender to the second pledgee of the amount due from the first pledgor to the first pledgee extinguishes *ipso facto* the title of the second pledgee; but it is well settled that there can be no recovery against him without tender of payment.²

Possession is of the essence of a pledge, and without it, either actual or constructive, it cannot be supported as against third persons.³

A special property may be vested in another than the owner of the general property without delivery of the personal property by an assignment of the *indicia* of ownership of the property, as a bill of lading by way of security. *Jenkyns v. Brown*⁴ is an instance of this kind. There K. purchased corn at New Orleans for the plaintiff, a London merchant, whose agent K. was. The purchase was made with K.'s money; and K. drew for the amount upon the plaintiff, the bill being in its body expressed to be on account of the corn. K. sold the bill to the defendant at New Orleans, and at the same time handed the defendant a bill of lad-

¹ *City Bank v. Barrow*, 5 Ap. Cas. 664. See also *Hayman v. Flewker*, 13 C. B. N. s. 519; *Mark v. Attenborough*, 1 B. & S. 831; *Wood v. Rowcliffe*, 6 Hare, 191; *Sheppard v. The Union Bank of London*, 7 Hurlst. & N. 661; *Paterson v. Tash*, 2 Str. 1178; *Cole v. The North Western Bank*, L. R. 10 C. P. 354; *Hartfield v. Phillips*, 12 Cl. & F. 343; *Moyce v. Newington*, 4 Q. B. Div. 32; *Johnson v. Credit Lyonnais Co.*, 2 C. P. Div. 224; 3 C. P. Div. 32.

² *Talty v. Freedman's Savings & Trust*

Co., 93 U. S. 321; *Jarvis's Admr. v. Rodgers*, 15 Mass. 369; *Lewis v. Mott*, 36 N. Y. 395; *Bateman v. Pool*, 15 Wend. 637; *Strong v. Black*, 46 Barb. 222; *Edmonson v. McLeod*, 16 N. Y. 543; *Baldwin v. Ely*, 9 How. 580; *Merchants' Bank v. The State Bank*, 10 Wall. 604; *Donald v. Suckling*, L. R. 1 Q. B. 585; *Moore v. Conham, Owen*, 123; *Ratcliffe v. Davis*, Yelv. 178; *Johnson v. Stear*, 15 C. B. N. s. 330.

³ *Casey v. Cavaroc*, 96 U. S. 467.

⁴ 14 Q. B. 495.

ing of the corn, which had been drawn for delivery to K.'s order, and indorsed by K., who, at the same time, empowered the defendant to sell the corn if the bill of exchange should not be paid. Afterwards K. advised the plaintiff of the transaction, forwarded to him the invoice, which stated the corn to be shipped at the risk and on the account of plaintiff, and requested the plaintiff to accept the bill of exchange. The corn having arrived in England, the plaintiff, who had accepted the bill of exchange, failed to pay it at maturity. The Court held that a special property passed to the defendant, and that no property passed to the plaintiff except upon the condition of his paying the bill of exchange, and that, he not having paid the bill, the defendant had a right to retain the property.¹

¹ See, on the point of the general property not passing under somewhat similar circumstances, the case of *Wait v. Baker*, 2 Ex. 1. See also *Chander v. Sprague*, 5 Met. 306; *Low v. Andrews*, 1 Story, 39; *Frost v. Goddard*, 25 Me. 414. We note that, in *Wait v. Baker*, the offer to sell the cargo, which was accepted in terms, was that the cargo was to be "free on board" ("f. o. b."); but it was still held,

under a very strong state of facts, that the property in the cargo did not pass to the vendee. See, in a later volume, where we point out the meaning of this term ("free on board"), and show that the construction placed upon these words by successive English courts, as implying that, by virtue thereof, the property in goods so shipped passes to the vendee, cannot be sustained.

BOOK II.

CERTAIN SPECIAL SALES.

PRELIMINARY.

It may be said in general that parties competent to become such to any contract may be parties to a contract of sale.

Certain parties, such as infants, married women, lunatics, and drunkards, are under certain disabilities affecting their contracts of all kinds, questions relating to which come up most frequently in connection with the contract of sale. There are also others, such as guardians and trustees, who from their occupying fiduciary relations to their wards and *cestuis que trust*, respectively, are likewise under disabilities. The law of agency is also an important one in connection with the law of sales. We shall consider subjects affecting the law of sales connected with these matters so far as may be necessary for our purposes.

PART I.

SALES WITH INFANTS.

THERE are three important points, which, as regards an infant's contracts, require some consideration. They are (1) the power of an infant to contract for necessities, whether for the use of himself, his wife, or child; (2) as to the power of an infant to bind himself by a contract for purchases other than for necessities; and (3) as to his power to ratify such last-named contract on his attaining his majority.

The cases on these points are very numerous, and it is now well established that, at common law, an infant can legally contract, so as to bind himself for necessities.¹

¹ In answer to a plea of infancy, in *Burghart v. Hall*, 4 M. & W. 727, the plaintiff replied, necessities. On the trial, it appeared that the infant had, at the time the goods were supplied, an allowance of £500 a year, besides his pay as captain in the

For a long time much confusion arose out of the terms "void" and "voidable" being confounded with each other with reference to an infant's contracts. It is now well settled that an infant's contracts, at common law, are not absolutely void, but are merely voidable at the election of the infant,¹ the protection being that of the infant, and not of the adult who may contract with him. The plea of infancy can only be pleaded by the infant, and not by an adult party to a contract with an infant.²

As to what are necessaries, it is laid down by old authorities³ that "An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards." And a minor is liable for necessaries suitable to his state and degree, and the jury must consider not only whether the articles were suitable in point of quality but also in point of quantity;⁴ the term "necessaries" including such things as are useful and suitable to the state and condition in life of the party, and not merely such as are requisite for bare subsistence.⁵

army. Lord Abinger, C. B., directed the jury that if the infant had an income sufficient to provide him with necessaries suitable to his condition, for ready money, he could not contract even for necessaries upon credit. The jury having found for the defendant, on a motion for a new trial the learned judge admitted that he had carried the law farther than any previous case had carried the rule, and in delivering the judgment of the court he laid down the rule that a minor is capable by law of entering into a contract, not merely for necessaries for ready money, but into any reasonable contract for necessaries, although he might have an income. This case was followed and approved in *Peters v. Fleming*, 6 M. & W. 42, where it was decided that it is a question for the jury whether the articles are such as a reasonable person, of the age and station of the infant, would require for real use. See the cases of *Ryder v. Wombwell*, L. R. 3 Ex. 90, and *L. R. 4 Ex. 32*, and *Johnston v. Marks*, 19 Q. B. Div. 509, stated *infra*.

¹ The law is now by statute otherwise in England. There, by the Infants' Relief Act, 1874 (37 & 38 Vic. c. 62), all contracts with infants for goods supplied or to be supplied, other than contracts for necessaries, are absolutely void, and incapable of being ratified.

² *Davies v. Turton*, 13 Wis. 185; *Oliver v. Hondlet*, 13 Mass. 237; *Nightingale v. Withington*, 15 Mass. 272; *Worcester v.*

Eaton, 13 Mass. 371; *Van Bramer v. Cooper*, 2 Johns. 279; *Hartness v. Thompson*, 5 Johns. 160; *Rose v. Daniel*, 3 Brev. 438; *Brown v. Caldwell*, 10 S. & R. 44.

³ Co. Lit. 172a; Bacon, Ab., *Infancy* (1).

⁴ *Burghart v. Angerstein*, 6 C. & P. 690; 1 M. & Rob. 458.

⁵ *Peters v. Fleming*, 6 M. & W. 42. And see *Manby v. Scott*, 2 Sid. 113; *Brooke v. Gally*, 2 Atk. 34; *Burghart v. Hall*, 4 M. & W. 727; *Brooker v. Scott*, 11 M. & W. 67, and *note*; *Wharton v. Mackenzie*, 5 Q. B. 606; *Harrison v. Fane*, 1 M. & G. 550; *Chapple v. Cooper*, 13 M. & W. 252; *Glover v. Admr. of Ott*, 1 McCord, 572; *Bouchell v. Clary*, 3 Brev. 194; *Rainwater v. Durhan*, 2 N. & McC. 524; *Coates v. Wilson*, 5 Esp. 152; *Hands v. Slaney*, 8 T. R. 578; *Hart v. Prater*, 1 Jur. 623; *Helps v. Clayton*, 17 C. B. n. s. 553; *Tupper v. Cadwell*, 12 Met. 559; *Grace v. Hale*, 2 Humph. 27; *Phelps v. Worcester*, 11 N. H. 51. And in such cases as an adult would be liable on his implied contract for necessaries for his wife and infant child, an infant would be similarly liable. "It is a well-established rule of law, that an infant has a right to avoid his contracts, and it matters not whether his contract is fair or unfair, he has a right to rescind it. But to this rule there are some exceptions. An infant may bind himself to pay for his necessary meat, drink, apparel, physic, and his good teaching and instruction,

The works on contracts so fully discuss the liabilities of infants on their contracts, that we confine ourselves to setting

whereby he may profit himself afterwards. He may also, if married, take up provision for his wife and children. But it must appear that the things were actually necessary, of reasonable prices, and suitable to the infant's degree and estate; considerations which regularly must be left to the jury." *Abell v. Warren*, 4 Vt. 149, 152. So, in *Beeler v. Young*, 1 Bibb, 520, the court said: "The law is settled, that an infant can only bind himself for necessary tuition, medicine, victuals and clothes, and such like necessities. Within these expressions 'such other necessities' may be included necessities for an infant's wife, or for nursing his lawful child." It is clear that an infant is liable on his express contract for necessities furnished his wife and lawful child; but we have advisedly qualified our statement of the law with reference to his liability on his implied contracts for necessities furnished them. He is so liable only to the extent that an adult would be liable on his implied contract. Benjamin states otherwise (*Benj. on Sales*, § 25: "What is supplied them on his express or implied credit is considered as purchased by him"), but the authorities he cites do not sustain his position. Broom's illustration of the maxim "*Persona conjuncta equiparatur interesse proprio*," thus, "So if a man under the age of twenty-one contract for the nursing of his lawful child, this contract is good, and shall not be avoided by infancy," relates clearly to the express contract of the infant. The old case of *Rainsford v. Fenwick*, Carter 215 (22 Car. 2) — "Infant of fifteen years of age marries a wife, may not he take up provision for his wife and children?" — is, also, a case of an express contract. Another old case (*Turner v. Trisby*, 1 Str. 168) holds that necessities for an infant's wife are necessities for him; but if provided for the marriage, he is not chargeable, though she uses them. He would, clearly, as regards his wife, be liable only for necessities to her to the same extent as an adult would be under similar circumstances; a subject which we consider in a later portion of this work. See *post*, Book II., Part IV.

As regards the liability of a father for necessities supplied to his minor children the authorities are not in harmony, but it is perfectly safe to say that where an adult parent is not liable for necessities furnished his minor children, an infant is not so. In *Nichole v. Allen*, 3 C. & P. 36, Lord Tenterden held at *nisi prius* that if a person knew that his illegitimate daughter

of the age of 16, was boarding and clothed by the plaintiff, and neither expresses dissent nor takes his daughter away, he is liable to pay the plaintiff for such board and lodging without any express promise to do so; and that it lies on the defendant to show that his daughter was boarded and lodged by the plaintiff against his consent, or that he has refused to maintain her any longer at his expense. He held further that there was not only a moral, but a legal obligation on the defendant to maintain his child, and, that, knowing where she was, and expressing no dissent, and not taking her away, he was liable for her support. In *Law v. Wilkin*, 6 A. & E. 720, Lord Denman lays down the law to the same effect. He says: "A father is properly liable for any necessary provision made for his infant son. In this instance the father was living at a short distance from the place where the goods were supplied. There was no evidence that he had authorized the master of the school, or any other person, to provide the boy with clothes, or that he had in any way furnished a supply for that purpose. If he wished to relieve himself from liability, I do not see why he should not have proved that he took such steps to provide for his son as rendered this supply unnecessary." The weight of authority, in England, at least, is decidedly the other way. Chief Justice Abbott, in *Baker v. Keen*, 2 Stark. 502, states the law thus: "A father would not be bound by the contract of his son, unless either an actual authority were proved, or circumstances appeared from which such an authority might be implied. Were it otherwise, a father, who had an imprudent son, might be prejudiced to an indefinite extent; it was therefore necessary that some proof should be given, that the order of a son was made by the authority of his father. The question, therefore, for the consideration of the jury was whether, under the circumstances of the particular case, there was sufficient to convince them that the defendant had invested his son with such authority." The law was similarly stated by Gurney, B., in *Rolfe v. Abbott*, 6 C. & P. 286, with the addition that the father is the person to judge what is proper for his son, and to charge the father it is essential that the goods should have been supplied with his assent, or by his authority. *Blackburn v. Mackay*, 1 C. & P. 1; *Fluck v. Tollernache*, 1 C. & P. 5; *Seaborne v. Maddy*, 9 C. & P. 497; *Mortimore v. Wright*, 6 M. & W. 482; 9 L. J. Ex. 158,

forth a few cases which make the law sufficiently clear on the subject for our purpose ; examining, in our notes, such matters in connection therewith as we think require special consideration.

and many other cases, are to the same effect. In the case of *Mortimore v. Wright* (*supra*) the decisions in *Nichole v. Allen*, 3 C. & P. 36, and *Law v. Wilkin*, 6 A. & E. 718, were strongly disapproved, and it was decided that a father is not liable for debts incurred by his son while under age, unless he has given an authority to the son to incur them, or has consented to pay them ; and that the moral obligation that he is under to provide for his children imposes no such liability. Lord Abinger said : " In point of law, a father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son than a brother, or an uncle, or a mere stranger would be. From the mere obligation a parent is under to provide for his children, a jury are, not unnaturally, disposed to infer against him an admission of a liability in respect of claims upon his son, on grounds which warrant no such inference in point of law. . . . If a father does any specific act, from which it may reasonably be inferred that he has authorized his son to contract a debt, he may be liable in respect of the debt so contracted ; but the mere obligation on the father to maintain his child affords no inference of a legal promise to pay his debts ; and we ought not to put upon his acts an interpretation which abstractedly, and without reference to that moral obligation, they will not reasonably warrant. In order to bind a father in point of law for a debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person ; and it would bring the law into great uncertainty, if it were permitted to juries to impose a liability in each particular case, according to their own feelings or prejudices." And Parke, B. ; " It is a clear principle of law, that a father is not under any legal obligation to pay his son's debts ; except, indeed, by proceedings under the 43 Eliz., by which he may, under certain circumstances, be compelled to support his children according to his ability ; but the mere moral obligation to do so cannot impose upon him any legal liability." See *Shelton v. Springett*, 11 C. B. 452 ; *Moon v. Towers*, 8 C. B. N. s. 611 ; *Andrews v. Garrett*, 6 C. B. N. s. 262. In *Shelton v. Springett* (*supra*), Maule, J., said : " People are very apt to imagine that a son stands in respect to being supplied with necessaries upon the same footing as a wife. But this is not so. If it

be asked, is, then, the son to be left to starve,—the answer is, he must apply to the parish, and they will compel the father, if of ability, to pay for his son's support. This is the course which the law points out. But the law does not authorize a son to bind his father by his contracts." This must now be considered the thoroughly established law in England. See *Urmonst v. Newcomen*, 4 A. & E. 899, and cases there cited.

The law on the subject in this country has been quite as unsettled as in England. The same irreconcilable conflict is shown in the text-books and in the cases as has characterized the law in England, prior to its being settled as it now is. Kent says : " During the minority of the child the parent is absolutely bound to provide reasonably for his maintenance and education ; and he may be sued for necessaries furnished, and schooling given to a child, under just and reasonable circumstances." 2 Kent's Com. 191. Two English cases are cited to sustain this proposition ; both being mere *nisi prius* decisions. The first, *Simpson v. Robertson*, 1 Esp. 17, contains a *dictum* by Lord Kenyon to that effect, which has been repeatedly overruled, as we have shown. The other case, *Ford v. Fotherill*, 1 Esp. 211, has no bearing on the question at all. It was an action, not against a parent at all, but against an infant, and Lord Kenyon held, that a person trusting an infant did it at his peril ; and, though it had been stated that a tradesman had no business to inquire into what dealings an infant had with others, he was of the opinion the tradesman was bound to make such inquiry, and if the infant had contracted other debts at the same time, for the same sort of articles for which the action was brought, such was good evidence to rebut the presumption of necessaries. Parsons, too, while stating the law as established in England, virtually as it is stated by us, states the rule as generally prevailing here, that, where necessaries are supplied to an infant, " the father's authority is presumed unless he supplies them himself, or was ready to supply them." 1 Parsons on Con. 305. Schouler, on the other hand, says :—" A father is not bound by the contracts or debts of his son or daughters even for necessaries, as a rule, unless the circumstances show an authority actually given or to be legally inferred." Sch. Dom. Rel. § 241. There are very many cases in this country which sustain both of these conflicting statements of law which we have

The Supreme Court of the United States discuss at length, in *Tucker v Moreland*¹ the question as to whether and in what

quoted from Kent and Schouler. We state some of them.

Weeks v. Merrow, 40 Me. 151, makes the distinction, that where a child leaves his parent's house, voluntarily, for the purpose of seeking his fortune in the world, or to avoid the discipline and restraint so necessary for the due regulation of families, he carries with him no credit; and the parent is under no obligation for his support. *Angel v. McLellan*, 16 Mass. 28. But that, on the other hand, if a minor is forced out into the world by the cruelty or improper conduct of the parent, and is in want of necessities, such necessities may be supplied, and the value thereof collected from the parent on an implied contract. So in *Cowls v. Cowls*, 3 Giln. (Ill.) 435, where infants were taken out of the custody of the father for improper conduct on his part, the court of chancery held that where the children had no property of their own, the father was bound for their support, and decreed that he should provide for their maintenance with their mother, from whom he had been divorced. The claim for necessities furnished children was sustained in *Cromwell v. Benjamin*, 41 Barb. 558, where the liability was put on grounds analogous to those in respect to the liability of a husband for his wife's support. And in *Van Valkenburgh v. Watson*, 13 Johns. 480, it was held, on the authorities in 1 Esp. cited by Kent, as above, that a parent is under a natural obligation to furnish necessities for his infant children; and if the parent neglect that duty, any other person who supplies such necessities is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent. But what is actually necessary will depend on the precise situation of the infant, and which the party giving the credit must be acquainted with at his peril. And where the infant is *sub potestate parentis*, there must be a clear and palpable omission of duty, on the part of the parent, in order to authorize any other person to act for, and charge the expense to the parent. In *Keaton v. Davis*, 18 Ga. 457, an action brought against the father for a bill paid for medical services for his son, it was held that if the son were a minor under the plaintiff's care, or that his parents were not near him, or had not made any such provision for him, or that the exigencies of the case made the payment of the bill reasonable and proper,

the law would have implied a promise by the father to pay the bill. In the old case of *Stanton v. Wilson*, 3 Day (Conn.), 37, 57, the law was admitted to be, as it is now settled in England, as generally true, that minors under the government of parents cannot bind their parents for necessities without their consent, — a sufficient reason being found for the rule from the danger of encouraging children in idleness and disobedience, and of their being inveigled into expense by the idle and designing. But it was held that the rule ceased when the father had abandoned his duty, and had forced his child abroad to seek a sustenance; that then he sends a credit along with him, and is not permitted to say it was furnished without his consent or against his will. *Owen v. White*, 5 Porter (Ala.), 435, is to the same effect. It was there held that a father is not bound by the contract of his son, even for articles suitable and necessary, unless an actual authority be proved, or the circumstances be sufficient to imply one. That, so long as the child continues under the direction and control of the father, it is left to the discretion of the parent to determine what is necessary for him, unless it appear that there is a clear omission of parental duty in providing for his maintenance. But where this is the case, the law subjects the father to the payment for necessities furnished by a third person, upon the ground that his neglect to do that which natural, moral, and municipal law have prescribed as a duty, implies an authority to bind the parent. The law is similarly stated in *Pidgin v. Cram*, 8 N. H. 350, 352. See also, *Thompson v. Dorsey*, 4 Md. Ch. 149; *Gill v. Read*, 5 Rh. Is. 343; *Rumney v. Keyes*, 7 N. H. 571; *Allen v. Jacobi*, 14 Ill. App. 277; *Tomkins v. Tomkins*, 11 N. J. Eq. 512; *Hillsborough v. Deering*, 4 N. H. 86; *Plaster v. Plaster*, 47 Ill. 290; *Girls' Industrial Home v. Fritchley*, 10 Mo. App. 344; *Courtright v. Courtright*, 40 Mich. 632; *People v. Strickland*, 13 Abb. N. C. 473 (under the New York Code); *Clark v. Clark*, 46 Conn. 586; *Jordan v. Wright*, 45 Ark. 237; *Dennis v. Clark*, 2 Cush. 347; *Reynolds v. Sweetser*, 15 Gray, 78; *Brow v. Brightman*, 136 Mass. 187 (A. D. 1883).

On the other hand, a large number of what we think are the better considered cases in this country are in harmony with what is now the settled law in England. The law is well laid down by Wilson, C. J., in *Hunt v. Thompson*, 3 Scam.

¹ 10 Peters, 58.

cases an infant's acts and contracts are voidable or void. As intimated above, a good deal of the confusion which has arisen in

(Ill.) 179, although in that State (Illinois) there are decisions the other way. In fact, so great is the conflict in this country, as it has been in England, on the question, that not infrequently in the courts of the same State, decisions as flatly contradictory of each other are found as are observable in the courts of the country as a whole. Wilson, C. J., says: "That a parent is under an obligation to provide for the maintenance of his infant children is a principle of natural law; and it is upon this natural obligation alone, that the duty of a parent to provide his infant children with the necessities of life rests; for there is no rule of municipal law enforcing this duty. The claim of the wife upon the husband, for necessities suitable to his rank and fortune, is recognized by the principles of the common law, and by statute. A like claim, to some extent, may be enforced in favor of indigent and infirm parents, and other relatives, against children, etc., in many cases; but, as a general rule, the obligation of a parent to provide for his offspring, is left to the natural and inextinguishable affection which Providence has implanted in the breast of every parent. This natural obligation, however, is not only a sufficient consideration for an express promise by a father to pay for necessities furnished his child, but when taken in connection with various circumstances, has been held to be sufficient to raise an implied promise to that effect. But either an express promise, or circumstances from which a promise by the father can be inferred, are indispensably necessary to bind the parent for necessities furnished his infant child by a third person." And in this case, which is a valuable one on the subject, it was held that the father was not liable for necessities furnished, against his order, to his son. The case of *Gordon v. Potter*, 17 Vt. 348, is another valuable case on the subject, in which Redfield, C. J., condemns the principle in the matter laid down by Kent, and shows that the authorities in *Espinasse*, to which we have referred, do not warrant Kent's conclusion. The court held, reversing the judgment of the court below, that to charge the father, it is essential that the goods should have been supplied with his assent or by his authority, adding that "It is obvious that this rule makes no provision for strangers to furnish children with necessities against the will of parents, even in extreme cases. For if it can be done in extreme cases, it can in every case where the necessity exists; and the

right of a parent to control his own child will altogether depend upon his furnishing necessities, suitable to the varying taste of the times. There is no stopping-place short of this, if any interference whatever is allowed. If the parent abandons the child to destitution, the public authorities may interfere, and, in the mode pointed out by statute, compel a proper maintenance. But this, according to the English common law, which prevails in this State, is not the right of every intermeddling stranger." *Raymond v. Loyl*, 10 Barb. 453, is in full accord with the well-decided English cases, and with the law as laid down by Redfield, C. J., in *Gordon v. Potter*, 17 Vt. 348; and notwithstanding the previous holding in New York, in *Van Valkenburgh v. Watson*, 13 Johns. 480, the rule as laid down by Kent is disapproved and dissented from; the authorities are fully examined, and the law as now held in England agreed with. The law was laid down with what we think is equal correctness in *Brown v. Deloach*, 28 Ga. 456. There, Benning, J., delivering the judgment of the court, says: "The question arises whether a father is bound to pay for necessities furnished to his minor child, but furnished without his authority. The English cases seem to answer this question in the negative [citing several of the cases cited by us, *supra*]. And we very much incline to think that the English cases are right. Not that we know of any very general variance in the American cases. [But there is though. See cases cited *ante*.] Even if a father is bound to furnish his child with necessities, and fails to do so, that does not impose an obligation on any third person to discharge the duty of the father. If a third person does it, then he does it voluntarily, and what right have voluntary services to expect more than voluntary compensation? If we may, of our own accord, discharge this duty for others, and compel them to pay us for it, why may we not, of our own accord, pay their debts, or discharge any of their other duties for them, and compel them to compensate us for so doing?" In *Angel v. McLellan*, 16 Mass. 28, Parker, C. J., delivering the judgment of the court, says: "The defendant's son had fallen into distress in a foreign country, to which he had fled to avoid the consequences of a crime committed in his native country. He was a minor and without property. The plaintiff, knowing his father to be a reputable merchant, paid his board, and supplied him with such things as were

the question, in the cases, has been the result of treating the two words as being synonymous, and thus referring to an act or

necessary for his condition, relying upon the honor and gratitude of the father to reimburse him. The liability of the father must depend altogether upon the principles of law which govern the relation of parent and child." The court then cautiously add: "*Perhaps* if he fail to furnish them with clothing and food necessary to the support of life, any one who furnishes such necessities may maintain an action against the father, upon the presumption of an assent on his part. Perhaps, also, if he cruelly and causelessly turn them out of doors, they would carry with them a credit on the father for the means of support; although it may be questioned whether, in such a case, the support of such children should not be provided for pursuant to the statute, requiring the kindred of poor persons within certain degrees to support them." And the court then state a principle in accord with the well-decided English cases, and with the American cases referred to in this paragraph, thus: "The law has wisely left individual cases of generous interference, to depend upon the honor of those connected with the object of it, rather than place in the hands of thoughtless or ill-disposed youth their parent's purse, to supply their wants with, whenever they should incline to deny his authority, and withdraw themselves from his government." It was afterwards decided in the same State, in *Loomis v. Newhall*, 15 Pick. 159, that the liability of a father under the Massachusetts Statute 1793, c. 59, § 3, to support his son, who is unable to support himself, does not accrue until proceedings have been had pursuant to the statute; consequently the furnishing supplies to the son before such proceedings have been had, is not a benefit to the father, so as to constitute a legal consideration for his promise, made after the supplies were furnished, to pay for them. The decision in *Hunt v. Thompson*, 3 Seam. 179, was followed in *Gotts v. Clark*, 78 Ill. 229, where necessities were furnished a minor daughter, and the father was held not liable, there being neither an express promise by him, nor circumstances from which a promise could be implied. In a later case in New York (*A. D.* 1880), *Bartels v. Moore*, 9 Daly, 235, which was an action against a father for necessities furnished his minor son, the court, in holding that the father was not liable, said: "The fact that the father ordered from the plaintiff clothes for his son when he was a mere child, and paid for them, would not authorize the plaintiff to furnish

clothes to the son when he was nineteen years of age, on his father's credit, unless the father expressly authorized it." This must not be understood as intimating that a contract might not be implied from circumstances, as correctly held in many of the well-decided cases.

In *Kelley v. Davis*, 49 N. H. 187, which is a very valuable case on the question, an unsatisfactory attempt is made to sustain the holding in *Pidgin v. Cram*, 8 N. H. 352; but as far as that case follows the law, as it purports to do, laid down by Keut, it is strongly dissented from. *Kelley v. Davis* decides that the legal obligation of the father to pay for necessities furnished a minor child rests upon contract alone; and where a parent gives no authority, and enters into no contract, he is no more liable to pay a debt contracted by his child, even for necessities, than a mere stranger would be. See, also, *Farmington v. Jones*, 36 N. H. 271; *Townsend v. Burnham*, 22 N. H. 277; *French v. Benton*, 44 N. H. 30, in accord with this holding; the deduction from the holding in which cases being that a parent cannot be charged for necessities furnished by a stranger for his minor child, except upon a promise to pay for them; and that such promise is not to be implied from mere moral obligation, nor from the statutes providing for the reimbursement of towns; but the omission of duty from which a jury may find a promise by implication of law must be a legal duty, capable of enforcement by process of law. *Kelley v. Davis*, 49 N. H. 187, 193. So, in Michigan, where a judgment against a father for necessities supplied to a son was reversed, it was done on the ground that the father had never authorized the son to buy on his account, nor had he in any way given the claimants to understand otherwise; there being no evidence of either an actual or implied authority, or of any assumption or confirmation of the transaction. *Tyler v. Arnold*, 47 Mich. 564 (*A. D.* 1882). In New Jersey, too, notwithstanding it was held and stated, in *Tomkins v. Tomkins*, 11 N. J. Eq. 512, 517, that—"The law, as it has been adopted in this State, is as laid down by the court in *Van Valkenburgh v. Watson*, 13 Johns. 480. A parent is bound to provide for infant children with necessities; and if he neglect to do so, a third person may supply them, and charge the parent with the amount," declaring, expressly, that the law as held in England "is not the law of New Jersey;" the late case, in that State, of *Freeman v. Robinson*, 38 N. J. L. 383,

contract as being void, when it is really only so at the election of the infant, and is therefore, in fact, voidable and not void.

adopts and follows the law as decided in England, and by the well-decided cases on the subject in this country. The New Jersey Supreme Court unanimously held, that the duty of a father to provide maintenance for his children is a mere moral obligation. Except in cases within the statute of Elizabeth, and by the procedure there pointed out, he is not legally compellable to perform this duty. No action can be maintained against a father for goods purchased on his credit by his minor child, even though they be necessities, unless the father has expressly or impliedly authorized the purchase on his credit. The authority of an infant to bind the father by contract for necessities may be inferred from slight evidence. But, nevertheless, where the parent gives no authority, and enters into no contract, he is no more liable to pay a debt contracted by his child, even for necessities, than a mere stranger would be. The mere moral obligation of a parent to maintain his child affords no legal inference of a promise to pay a debt contracted by him even for necessities. And, reversing the judgments of the courts below, the Supreme Court held further, that the duty being one of moral obligation only, and the necessities having been furnished without the request of the father, actual or implied, his subsequent promise to pay for them was without the consideration which is necessary to the validity of a contract. See further, *McMillen v. Lee*, 78 Ill. 433; *Clark v. Gotts*, 1 Bradw. (Ill. App.) 454; *Wallace v. Ellis*, 42 Ind. 582; *White v. Mann*, 110 Ind. 74 (A. D. 1886); *Burns v. Maddigan*, 60 N. H. 197 (A. D. 1880); *Bundy v. Hyde*, 50 N. H. 116; *Cook v. Bennett*, 51 N. H. 85, 93; *Baldwin v. Foster*, 138 Mass. at p. 453 (A. D. 1885); *Rogers v. Turner*, 59 Me. 116. After the very fullest examination of the authorities, both English and American, we can but come to the conclusion that in England, on principle and authority, the law is well established, as we have stated it to be; and that, in this country, on principle and on the overwhelming weight of authority, it is now scarcely less so; the cases which have followed Kent's statement of the law, and his misreading of the two cases in 1 Esp., and the overruled case of *Van Valkinburgh v. Watson*, 13 Johns. 480, are, we think, founded on an entire misconception of the law.

But it has been held, where the defendant's minor son, to whom his father had given leave to act for himself, and had made publication of the fact, and that he would not thereafter pay any debts of the

son, was at home sick, and medical services were rendered to him upon the credit of his father, to whom, in good faith, the services were charged at the time; the father knowing of these services being rendered and making no objection; that the law implies a promise to pay, by the father, on the general ground, that while one's minor children remain a part of his family and household, and receive necessities, with the knowledge of the father and without objection on his part, it is the same thing as if he received them himself, or his wife received them. *Swain v. Tyler*, 26 Vt. 9. See *Deane v. Arnis*, 14 Me. 26, to the same effect. But, where a son, who was of full age and had ceased to be a member of his father's family, was suddenly taken ill among strangers, and, being poor and in distress, was relieved by the plaintiff, it was held that an express promise by the father to pay the bill would not sustain the action. *Mills v. Wyman*, 3 Pick. 207. See *Cook v. Bradley*, 7 Conn. 67; *Littlefield v. Shee*, 2 B. & Ad. 811; *Parker v. Carter*, 4 Munf. 273; *Wennall v. Adney*, 3 B. & P. 249, note; *McPherson v. Rees*, 2 Penn. & Watts, 521; *Pennington v. Gittings*, 2 Gill & J. 208; *Smith v. Ware*, 13 Johns. 259; *Edwards v. Davis*, 16 Johns. 281, 283, note; *Greeves v. McAllister*, 2 Binn. 591; *Chandler v. Hill*, 2 Hen. & M. 124. And a request by a father to attend his son, then of full age, and sick at his father's house, raises no implied promise on the part of the father to pay for the services rendered. *Boyd v. Sappington*, 4 Watts, 247.

A general order from a father to supply his daughter with such goods as she wanted, made her his agent to contract, and made him liable for her purchases, though she exceeded what was actually necessary for her comfort. *Harper v. Lemons*, 38 Ga. 227. And the only ground upon which a father can be made liable for the purchases of his son after he becomes of age, is on the ground that the son, either expressly or impliedly, has become his father's agent to make the purchases. *Townsend v. Burnham*, 33 N. H. 270; *Wood v. Gill*, 1 Cox (N. J.), 449. See, further, as to the father's liability for his son's acts and contracts, *Norris v. Dodge*, 23 Ind. 190; *Hagerty v. Powers*, 66 Cal. 368; *Baker v. Morris*, 33 Kan. 580; *Bryan v. Jackson*, 4 Conn. 288; *Stovall v. Johnson*, 17 Ala. N. S. 14; *Clinton v. Rowland*, 24 Barb. 634; *Wilkes v. McClung*, 29 Ga. 371.

See *Matter of Marx*, 5 Abb. N. C. 225, a decision of the surrogate court, as to the

The conclusion reached as the result of the American authorities, recognizing and adopting the doctrine of *Zouch v. Parsons*¹ is, that the acts and contracts of infants generally are voidable only, and not void; and subject to their election, when they become of age, either to affirm or disallow them; they seeming generally to hold that the deed of an infant conveying lands is voidable only, and not void; unless, perhaps, the deed should manifestly appear on the face of it to be to the prejudice of the infant; and this upon the nature and solemnity, as well as the operation of the instrument. The distinction would seem to be clearly covered by this test: All the acts and contracts of an infant to which the plea of infancy would be a conclusive answer, are voidable at his instance, and not void. Such acts and contracts to which the plea of infancy would not be a conclusive answer are neither voidable nor void. The latter case would include the single case of necessities, leaving all other acts and contracts of an infant within that class which he might affirm or disallow on becoming of age; and, therefore, voidable and not void. An infant is incapable of contracting so as conclusively to bind himself, in any case except for necessities. Outside of this one case his acts and contracts are, we consider, clearly, on principle, in the same category, and are in his power to affirm or disallow, and are therefore, voidable in the sense that, at his instance, they may be avoided. Where contracts are manifestly to his prejudice, the class of acts by which such contracts may be affirmed by the infant, may, manifestly, be very different from cases where the acts or contracts are for his benefit, but this only goes to the evidence of affirming, and does not show that the acts or contracts of the infant are *per se* void. Any contract which one of full age can make can be affirmed by an infant on his coming of age; the affirmation being of the nature of a new contract; the previous

right of a parent to be allowed for the maintenance of his child out of the latter's separate estate. We question the correctness of this decision. See, holding *contra*, except where the father is in indigent circumstances, *Freeman v. Coit*, 27 Hun (N. Y.), 448; *Hines v. Bryan*, 25 Ga. 696; *Tompkins v. Tompkins*, 17 N. J. Eq. 303; *Myers v. Myers*, 2 McCord (S. C.), 214; *Addison v. Bowie*, 2 Bland Ch. (Md.) 606; *Kinsley v. The State*, 98 Ind. 351; *Burke v. Turner*, 85 N. C. 500; *Walling's Case*, 35 N. J. Eq. 105. And then, the proper course of the parent is to obtain authority from the court having jurisdiction to make such expenditure as guardian. *Watts v. Steele*, 19 Ala. 656; *Haase v. Rothscheid*, 6 Ind. 66; *Heyward v. Cuthbert*, 4 Des. Eq. (S. C.) 445. A step-father who was

appointed guardian to his step-son, was allowed out of the step-son's estate for maintenance of his step-son as well before as after the appointment. *In re Besondy*, 32 Minn. 385.

In *Chapple v. Cooper*, 13 M. & W. 252, an infant widow was held bound by her contract for the furnishing of the funeral of her husband, who had left no property to be administered. And in *Jenner v. Walker*, 19 L. T. N. S. 398 (*secus* Law Repr.), it was held that presents to a lady who subsequently became the defendant's wife, might be necessities. And in *Butler v. Breck*, 7 Mete. 164, that a husband, though an infant, is liable for debts contracted by his wife before marriage.

¹ 3 Burr. 1804.

contract of the infant, except in the exceptional case of necessities, being not binding on him; and, therefore, when he becomes legally able to act, may be avoided by him. In *Tucker v. Moreland*¹ the court held, that, 1. An infant may avoid his voidable acts by different means, according to the nature of the act to be avoided. 2. A conveyance by bargain and sale, the infant remaining in possession, may be avoided by a second conveyance by bargain and sale, with a warranty against all claims under the bargainor. 3. A mere recognition of a conveyance by an infant does not confirm it; the act of confirmation should establish an intention to confirm it, with knowledge that it was voidable.²

Where to a plea of infancy, in an action for goods supplied, the plaintiff replies that they were necessities, the question of necessities or not necessities is one of fact, and, therefore, for the jury. But, like all other questions of fact, it should not be left to the jury by the judge, unless there is evidence on which they can reasonably find in the affirmative.³

The plaintiff sued the defendant, a minor, for the price of a pair of jewelled solitaires, worth £25, and of an antique goblet worth £15 15s., which the plaintiff knew when he supplied it was intended for a present. The defendant was the son of a baronet, with no independent establishment, and in the receipt of an allowance of £500 a year. The question whether these articles were necessities or not was left to the jury, who found that they were, and a verdict for the plaintiff for £40 15s. was accordingly entered. The Court of Exchequer subsequently held, first, that there was no evidence for the jury of the goblet being a necessary, and that, therefore, the verdict ought to be reduced by its price; and, secondly (Bramwell, B., dissenting), that there was evidence, which was properly left to the jury, and from which they might fairly conclude, that the solitaires were necessities.⁴

¹ 10 Peters, 58.

² The following cases cover the points involved: *Zouch v. Parsons*, 3 Burr. 1804; 1 W. Blk. 575; *Russell v. Lee*, 1 Lev. 86; *Fisher v. Mowbray*, 8 East, 330; *Baylis v. Dineley*, 3 M. & S. 470; — *v. Handcock*, 19 Ves. 383; *Saunders v. Mann*, 1 H. Blk. 75; *Keane v. Boycott*, 2 H. Blk. 515; *Thompson v. Leach*, 3 Mod. 310; *Holmes v. Blogg*, 8 Taunt. 508; *Oliver v. Hendlet*, 13 Mass. 239; *Whitney v. Dutch*, 14 Mass. 462; *Conroe v. Birdsell*, 1 Johns. Cas. 127; *Roof v. Stafford*, 7 Cow. 180, 181; *Jackson v. Burchin*, 14 Johns. 126; *Boston Bank v. Chamberlain*, 15 Mass. 220; *Jackson v. Carpenter*,

11 Johns. 539; *Austin v. Patton*, 11 S. & R. 311; *Stokes v. Brown*, 3 Pinney, 311; *Reed v. Batchelder*, 1 Met. 559; *Martin v. Mayo*, 10 Mass. 137; *Thompson v. Lay*, 4 Pick. 48; *Goodsell v. Myers*, 3 Wend. 479; *Robbins v. Eaton*, 10 N. H. 561; *Roberts v. Wiggan*, 1 N. H. 74; *Dearborn v. Dearborn*, 4 N. H. 441; *Ford v. Phillips*, 1 Pick. 202; *Hale v. Gerrish*, 8 N. H. 374; *Thrapp v. Fuedes*, 2 Esp. 628; *Hitchcock v. Tyson*, 2 Esp. 482; *Bigelow v. Kinney*, 3 Vt. 353; *Dubose v. Wheldon*, 4 McCord, 221.

³ *Ryder v. Wombwell*, L. R. 4 Ex. 32.

⁴ *Ibid.*, L. R. 3 Ex. 90.

On appeal, the Court of Exchequer Chamber held, reversing the judgment of the court below on the second point, that there was no evidence of either article being a necessary, and that a nonsuit ought to have been directed.¹

The late case of *Johnston v. Marks*² was an action by the plaintiff, a tailor, against the defendant for the price of clothes supplied. The defence was infancy, to which the plaintiff replied that the goods supplied were necessities. It was proved at the trial that the goods were supplied to the defendant when under age. The defendant's solicitor proposed to prove that the defendant was sufficiently supplied with clothes at the time of his purchases from the plaintiff. The judge, on the authority of *Ryder v. Wombwell*,³ held the evidence inadmissible, and gave a verdict for the plaintiff for the price of such of the clothes as he held were necessities. Three of the members of the Court of Appeal, who sat as a divisional court of the Queen's Bench division, held, that the evidence was wrongly rejected. Lord Esher, M. R., thus laid down the principles applicable to this case: "It lies upon the plaintiff to prove, not that the goods supplied belong to the class of necessities as distinguished from that of luxuries, but that the goods supplied when supplied were necessities to the infant. The circumstance that the infant was sufficiently supplied at the time of the additional supply is obviously material to this issue, as well as fatal to the contention of the plaintiff with respect to it." The decision in *Ryder v. Wombwell*³ was reflected on, and as the court added, that, should the question be raised before them sitting as a division of the Court of Appeal, they would be prepared to give the same decision as they were then doing, *Ryder v. Wombwell*³ has, in effect, been overruled. Lindley, L. J., referred to it as being contrary to current authority; adding, "If an infant can be made liable for articles which may be necessities, without proof that they are necessities, there is an end to the protection which the law gives him. If he has enough of such articles, more cannot possibly be necessary for him."

¹ *Ibid.*, L. R. 4 Ex. 32. And see, on the same question, *Chapple v. Cooper*, 13 M. & W. 252, 258; *Maddox v. Miller*, 1 M. & S. 738; *Wharton v. Mackenzie*, 5 Q. B. 606; *Harrison v. Fane*, 1 M. & G. 550; *Burghart v. Hall*, 4 M. & W. 727; *Burghart v. Angerstein*, 6 C. & P. 690; *Renaux v. Teakle*, 8 Ex. 380; *Dalton v. Gibb*, 5 Bing. N. C. 198; *Rainsford v. Fenwick*, Carter, 215; *Greene v. Chester*, 2 Rolle, 144; *Ive v. Chester*, Cro. Jac. 560; *Wittingham v. Hill*, Cro. Jac. 494;

Hands v. Slavey, 8 T. R. 578; *Brayshaw v. Eaton*, 7 Scott, 183; *Cook v. Deaton*, 3 C. & P. 114; *Steedman v. Rose*, Car. & M. 422; *Peters v. Fleming*, 6 M. & W. 46; *Brooker v. Scott*, 11 M. & W. 67. With the exception of these two last-named cases, the general current of the decisions is that the question of necessities is for the jury.

² 19 Q. B. Div. 509, July 27, 1887.

³ L. R. 3 Ex. 90; L. R. 4 Ex. 32.

Lord Esher said that in *Ryder v. Wombwell*¹ the Court of Exchequer Chamber had before them cases which were inconsistent with the view taken in the court below, but, holding as they did that the goods supplied could not possibly be necessaries, there was no occasion for them to decide whether this evidence was relevant. A divisional court has since, in *Barnes v. Toye*,² decided that the evidence is relevant, and I entirely agree with the decision.³

¹ L. R. 4 Ex. 32.

² 13 Q. B. Div. 410.

³ *Johnston v. Marks*, 19 Q. B. Div. at p. 511. And see further, the cases cited in the previous note, and *Foster v. Redgrave*, 4 Ex. 35, in note; *Bainbridge v. Pickering*, 2 W. Blk. 1325; *Brayshaw v. Eaton*, 5 Bing. N. C. 231; 7 Scott, 183.

In *Jenner v. Walker*, 19 L. T. N. S. 399, the decision in *Ryder v. Wombwell*, 3 Ex. 90, 4 Ex. 32, was very much remarked on. Cockburn, C. J., there said: "I really cannot understand it, unless it means that it is to be a question of law for the judge to determine whether the articles disputed are or are not necessaries. If that is to be taken to be law, of course I must act upon it; but I should certainly have preferred the law as it was previously understood to be,—that it was for the jury to say what articles were reasonably necessary with reference to the position of the defendant, the infant." Coleridge, Q. C. (counsel in the case), in reply to the chief justice, said: "I am bound to say that I think *Ryder v. Wombwell* does in effect come to what you have stated; namely, that it is not for the jury, but for the judge, to say whether an article is necessary. That, certainly, is what it came to, for the jury found the solitaires (shirt-fasteners) necessary, and the court directed judgment to be entered for the defendant. That, certainly, is quite contrary to a long series of decided cases, and to the law as it has always been understood to be; but that is what it comes to." Cockburn, C. J., assented to this; and though he expressed himself as bound by the holding in *Ryder v. Wombwell*, he so emphatically dissented from it that he left the question to the jury as to the articles being necessaries for which the action was brought; and the jury's finding in the matter agreeing with his own, the decision in *Ryder v. Wombwell* was not allowed to affect the case.

The other point decided in *Ryder v. Wombwell* (*supra*) was that where an infant is sued for the price of goods supplied to him on credit, evidence to prove that at the time the goods were supplied to him he was already sufficiently provided with

articles of a similar description, is inadmissible, unless it is also shown that the plaintiff had knowledge of the fact. In *Barnes v. Toye*, 13 Q. B. Div. 410, *Ryder v. Wombwell* is dissented from on both points; and, as we have seen in the text, the holding in *Barnes v. Toye* was fully approved and acted on in *Johnston v. Marks*, 19 Q. B. Div. 509. In *Barnes v. Toye*, 13 Q. B. Div., at p. 412, Field, J., dealt with both these questions. He says: "We have to deal with the question whether an infant can bind himself for things which are necessaries, in the sense of belonging to the class of necessaries, and being suitable to his position in life, if they are not really necessaries in the sense that he could do without them. In *Ryder v. Wombwell*, L. R. 3 Ex. 90, this point was decided in favor of the tradesman; for the court then held (Bramwell, B., dissenting) that evidence to show that the infant was already sufficiently supplied was properly rejected, as it was not proposed to show that the plaintiff had knowledge of that fact. If there had been no authority against this decision, I should have declined to go into the question whether it was right; but there is such authority, both in former and in modern times. In *Bainbridge v. Pickering*, 2 W. Blk. 1325, and in *Brayshaw v. Eaton*, 5 Bing. N. C. 231, the question of whether the defendant was already provided with clothes was considered as pertinent to the inquiry whether those which the plaintiff supplied were necessaries; and the learned judges who heard the case of *Foster v. Redgrave*, L. R. 4 Ex. 35, N. S., could not distinguish that case from the two last mentioned, which they accordingly followed. Under these circumstances, I am of opinion that the question should have been left to the jury whether these were necessaries, taking into consideration not merely the character of the goods, but the question whether the defendant was in possession of such a supply of goods of the same description that he was not in want of these." The same points are very clearly covered by the judgment, in the same case, of Lopes, J., who says: "A contract by an infant

A deed by an infant to secure the repayment of money advanced for necessities is voidable. Therefore, when the plain-

for the supply of goods to him cannot be enforced unless the articles be necessities, the policy of the law being directed to the protection of infants. In point of fact, a tradesman dealing on credit with an infant does so at his peril, and must lose his money (that is, if the infant does not voluntarily pay him), unless he can prove that the goods supplied were necessities for the infant according to his station in life. That being the law, we come to the question, What are necessities? To determine this, we must take into account what the infant had at the time of giving the order. For example, a watch may be *prima facie* in some cases a necessary; but if it turned out that the infant was already supplied with a watch or watches, the one ordered could not be a necessary. It is said, however, that, even if regard must be had to the supply which the infant had at the time of the order, where it is in the tradesman's knowledge that the infant is amply supplied, yet this is not the case if the tradesman is ignorant of that fact. If this contention were correct, the protection given to the infant would depend entirely on what might be the state of knowledge of the tradesman, and one effect would be to deprive the infant of the protection intended to be extended to him by the law. In my view it is immaterial whether the plaintiffs did or did not know of the existing supply, just as it is immaterial whether they did or did not know that the defendant was a minor. In this particular case, evidence as to the amount of clothes the defendant possessed at the time when the order relied on was given was admissible; and [covering both the points badly decided in *Ryder v. Wombwell*] *the jury should have been told that in arriving at a conclusion whether the goods supplied by the plaintiffs were necessities or not, they should consider whether the defendant was already sufficiently supplied.*"

But where it is palpable that the articles could not be necessities, then there is no question for the jury, and the plaintiff should be nonsuited. This was the holding in *Foster v. Redgrave*, L. R. 4 Ex. 35, n. 8, where the evidence showed that the infant was already provided with an ample wardrobe at the time the goods sued for were ordered and supplied, although the plaintiff did not know the fact, and the rule for a nonsuit was made absolute. The cases of *Bainbridge v. Pickering*, 2 W. Blk. 1325, and *Brayshaw v. Eaton*, 7 Scott, 183, are in accord with this holding. See, further, *Dalton*

v. Gib, 7 Scott, 183; *Rolfe v. Abbott*, 6 C. & P. 286; *Ursuston v. Newcomen*, 6 N. & M. 454; *Ford v. Fothergill*, Peake, N. P. 229; *Baker v. Keen*, 2 Stark. 501.

The decisions in this country harmonize with the well-decided cases in England on both points which were misdecided in *Ryder v. Wombwell*, L. R. 3 Ex. 90; L. R. 4 Ex. 32. On the point as to the fact of articles being necessities being subject to be rebutted by showing that the infant had, at the time, a sufficient supply, that doctrine is as laid down by *Greenleaf*, § 366, Gr. on Ev. And, although English authorities are mainly cited for that position, numerous authorities in this country sustain it. See *Rivers v. Gregg*, 5 Rich. Eq. (S. C.) 274, where the law in the case is laid down in virtually the same language as has been used in the latest English cases, such as *Johnston v. Marks*, 19 Q. B. Div. 509; *Barnes v. Toye*, 13 Q. B. Div. 410, and the other cases approved by these. In *Rivers v. Gregg*, *Dargan*, Ch., delivering the judgment of the court, said; "He who deals with an infant is presumed to know of his infancy. He is bound, at his own peril, to make the inquiry. It makes no difference whether the inquiries result in correct information or the reverse. It is no excuse, if he honestly supposed, from his appearance or other circumstances, that the infant was an adult. The protection of this defenceless class of persons would be very inadequate, if this principle is not further extended. The only safe rule, for the security of infants and their estates, is, that he who credits the infant for necessities, should be bound to know whether the infant has been supplied with a sufficient amount of those articles by the parent or guardian, or from some other source. The consequence, if any other rule than this prevails, would be, that an infant's estate might be made liable for double the amount of necessities that were necessary for him. . . . The conclusion is, that an infant who is furnished with necessities, or the means in cash of procuring them, by his parent or guardian, or from any other source, is, *prima facie*, not liable for necessities supplied by a stranger or tradesman on a credit; and that the party who seeks to evade the operation of the rule, and bring his claim under an exception, must prove the destitution and necessities of the infant." *Rivers v. Gregg*, 5 Rich. Eq. 279, 281. See, also, *Connolly Ads. Hull*, 3 McCord, 6; *Edwards v. Higgins*, 2 McCord Ch. 21; *Jones v. Colvin*, 1 McMullan, 14;

tiff has advanced money to an infant partly in order to pay for necessities, and he had by deed assigned to the plaintiff his reversionary interest as a security; in an action brought against the infant on his attaining twenty-one, for an account of money advanced to him and expended on necessities, and for repayment, and also claiming that the same might be declared to be a charge on his reversionary interest; it was held, that, though the plaintiff was entitled to an account and an order for repayment, the deed was not binding on the infant, and the security could not be enforced.¹

Johnson v. Lines, 6 Watts & S. 80; *Walling v. Toll*, 9 Johns. 141; *Nicholson v. Wilborn*, 13 Ga. 467, 474 *et seq.*; *Nicholson v. Spencer*, 11 Ga. 607. In this last-named case, the court say: "It is a general rule of law, that when a tradesman furnishes an infant with goods on credit, it is incumbent on him to show that the articles furnished were necessities, according to the circumstances and condition of life of such infant, before he can recover the price of the goods so furnished. Parents and guardians are the best judges as to what are necessities for their children and wards; and whenever a tradesman furnishes them with articles, in addition to what their parents and guardians have provided them, it is incumbent on such tradesman to show a necessity therefor, to entitle him to recover the price of the articles so furnished. The tradesman trusts the infant at his peril." *Nicholson v. Spencer*, 11 Ga. at p. 611. This is the long and thoroughly well-established law of this country, and, as we have intimated, accords with the established law in England, temporarily broken in upon by the disapproved case of *Ryder v. Wombwell*, L. R. 3 Ex. 90; L. R. 4 Ex. 32.

So, too, the law in this country agrees with that of England, that the question as to what are necessities is a mixed one of law and fact. Thus, Greenleaf correctly lays down the law of both countries, that necessities are such things as are useful and suitable to the party's state and condition in life, and not merely such as are requisite for bare subsistence. And of this the jury are to judge, under the advice and control of the court. *Gr. on Ev.* § 365. The great mass of the English cases we have cited in this note sustain this statement of the law. The authorities in this country are to the same effect. Thus in *Johnson v. Lines*, 6 W. & S. 80, the court holds that what are necessities is a question of mixed law and fact; but that an over-supply of goods otherwise proper ceases to be a supply of

necessaries as to the excess, and that while the question of extravagance belongs to the jury, where the supply has been so grossly profuse as to shock the sense, it is the business of the judge to say so as matter of law, and charge that there can be no recovery for more than was absolutely necessary. So, in *Merriam v. Cunningham*, 65 Mass. 40, Bigelow, J., said: "It is the well-settled rule that it is the province of the court to determine whether the articles sued for are within the class of necessities, and if so, it is the proper duty of the jury to pass upon the questions of the quantity, quality, and their adaptation to the condition and wants of the infant." See *Bent v. Manning*, 10 Vt. 225, 230; *Stanton v. Willson*, 3 Day (Conn.), 37, 56; *OWINGS v. Trotter*, 1 Bibb (Ky.), 157; *Phelps v. Worcester*, 11 N. H. 51; *Swift v. Barnett*, 64 Mass. 436; 20 Am. Jur. 283; *Beeler v. Young*, 1 McCord, 572. See as to necessities the late case of *House v. Alexander* (A. D. 1885), 105 Ind. 109.

¹ *Martin v. Gale*, 4 Ch. D. 428. See further, on the point involved in this case, *Marlow v. Pitfield*, 1 P. Wms. 558; *Jenner v. Morris*, 3 De G. F. & J. 45; *Co. Litt.* 171 a; *In re Howarth*, L. R. 8 Ch. 415, 418; *Maddon v. White*, 2 T. R. 159, 161; *Lunsden's Case*, L. R. 4 Ch. 31. Notwithstanding the holding in some of these cases, it is now clear that all an infant's contracts are voidable, except those for necessities, for which, for his own protection, he is personally liable even during his minority. On the other hand, none of such contracts are, at common law, absolutely void, to the extent that they cannot be ratified by the infant on attaining full age. In many of the cases the term "void" means no more than that the infant's contract cannot be enforced without ratification. See *Strain v. Wright*, 7 Ga. 568; *Bryan v. Walton*, 14 Ga. 185; *Williams v. Brown*, 34 Me. 594; *Baker v. Lovett*, 6 Mass. 87; *Oliver v. Hondlet*, 13 Mass. 237; *Whitney v. Dutch*, 14 Mass. 457; *Thompson v. Hamilton*, 12 Pick. 425;

In *Irvine v. Irvine*¹ it was claimed that an infant's deed of real estate was void because of his infancy. But, the Supreme Court

Edgerton v. Wolf, 6 Gray, 453; *McCoy v. Huffman*, 8 Cow. 84; *Aldrich v. Abrahams*, Hill & D. Supp. (N. Y.) 423; *Stafford v. Roof*, 9 Cow. 626; *Slocum v. Hooker*, 13 Barb. 536; *Wheaton v. East*, 5 Yerg. 41; *Radford v. Westcott*, 1 Dess. (S. C.) 596. But where goods are sold to an infant on credit, and he avails himself of his infancy to avoid payment, the vendor may reclaim the goods, as having never parted with the property in them. *Badger v. Phinney*, 15 Mass. 359. Where an infant bought a horse, for which he paid \$75 in cash and gave a mortgage for the balance, and then avoided the mortgage, it was held that the seller had a right to retake the horse—which, in the mean time, had been injured by the infant—without refunding the \$75. *Heath v. West*, 28 N. H. 101. See *Lucey v. Bundy*, 9 N. H. 298; *Hunt v. Silk*, 5 East, 449; *Holmes v. Blagg*, 8 Taunt. 508; *Corpe v. Overton*, 10 Bing. 252; *Farr v. Sumner*, 12 Vt. 28; *Fitts v. Hall*, 8 N. H. 441; *Roberts v. Wiggin*, 1 N. H. 71; *Weed v. Beede*, 21 Vt. 500. Where an infant rescinds a contract made by him for the sale of personal property, and seeks to reclaim the property or its value, he must restore, or offer to restore, the consideration received, before he can sustain an action for the property sold. *Carr v. Clough*, 26 N. H. 280; *Ketchen v. Lee*, 11 Paige, 107; *Hubbard v. Cummings*, 1 Greenl. 13; *Taft v. Pike*, 14 Vt. 409; *Buffington v. Gerrish*, 15 Mass. 156; *Smith v. Evans*, 5 Humph. 70; *Holmes v. Blogg*, 8 Taunt. 508; *Roberts v. Wiggin*, 1 N. H. 73; *Roof v. Stafford*, 7 Cow. 182; *Smith v. Evans*, 24 Humph. (Tenn.) 70. Where an infant had written her name on the back of stock-certificates, by means of which her guardian sold the stock, it was held that she could avoid the sale on the ground of infancy, even if she had signed her name to enable her guardian to effect the sale. *Smith v. Baker*, 42 Hun, 504 (A. D. 1886). See *Ackley v. Dygert*, 33 Barb. 176; *Brown v. McCome*, 5 Sandf. 224.

Parsons, in his work on Contracts (Vol. I. p. 322), says: "If an infant advances money on a voidable contract which he afterwards rescinds, he cannot recover this money back, because it is lost to him by his own act, and the privilege of infancy does not extend so far as to restore the money unless it was obtained from him by fraud." In the late case of *House v. Alexander*, 105 Ind. 109 (A. D. 1885), it is said of this proposition that "it is not

and never was the law." It has also been repudiated in other cases, expressly in *Robinson v. Weeks*, 56 Me. 102, 104, and in *Shurtleff v. Millard*, 12 R. I. 272. See, also, *Sparman v. Kerin*, 83 N. Y. 245; *Cooper v. Allport*, 10 Daly (N. Y.), 352; *Carpenter v. Carpenter*, 45 Ind. 142; *White v. Branch*, 51 Ind. 210; *Indianapolis, &c. Co. v. Wilcox*, 59 Ind. 429; *Ayers v. Burns*, 87 Ind. 245; *Riley v. Mallory*, 33 Conn. 201, 207; *Price v. Furman*, 27 Vt. 268.

The statement made by Parsons, though too broadly made, has been made by others as well. Thus, Chitty on Contracts (6th Am. ed.), 154, contains the following: "An infant's right to elect whether he will avoid or confirm a contract entered into by him during his infancy, does not necessarily entitle him to recover back money which he has paid thereon. It is indeed a general rule that an infant cannot recover back money paid by him, even upon a contract which by reason of his infancy he is not bound to complete, there being no imposition." And Story on Sales, § 25: "If an infant should purchase a watch, and pay for it, he could not, by disaffirming his contract, and offering the watch in return, found any claim to recover the sum paid by him." So, in *Drury v. Drury*, 2 Eden, 38, 71, Lord Mansfield says: "Infancy never authorizes fraud; as, if goods were delivered to an infant, and he embezzle them, trover would lie against him; or if he took an estate, and was to pay rent for it, he should not hold the estate, and defend himself against payment of the rent, by pretence of infancy. If an infant pays money with his own hand, without a valuable consideration for it, he cannot get it back again." See Wilmot's Opinions, 226, note. In *Wilson v. Kears*, 2 Peake, 196 (A. D. 1800), Lord Kenyon held the exact principle stated by Prof. Parsons. It was a case where an infant contracted with the defendant to purchase of him the goodwill and stock of a public house, and made a deposit of £20. Refusing to complete the contract, he brought an action for the £20. Lord Kenyon held that though an infant was not compellable to complete a contract, yet that when he had paid money under it he could not recover it back unless he could show that fraud had been practised on him. If an infant was to buy a thing not being necessities, he could not be compelled to pay for it; but having done so, he could not

of the United States said, affirming the decision of the Circuit Court: "Whatever may have been the doubts once entertained, it

recover back the money. The same question came up again (A. D. 1818) in *Holmes v. Blogg*, 8 Taunt. 508; 2 Moo. 552; where the case of *Wilson v. Kearse*, 2 Peake, 196, not having been called to the attention of the court, they considered it a case of first instance. In *Holmes v. Blogg* (*supra*), assumpsit was brought for £157 10s. for money paid by an infant as premium for a lease, he having enjoyed the premises for a short period during his infancy, but having avoided the lease after he became of age, quitting the premises. The court held that he could not recover the money so paid; approving of the principle laid down by Lord Mansfield in *Drury v. Drury*, 2 Eden, 60, and apparently approved by Wilmot, C. J., that if an infant pays money with his own hands, without a valuable consideration, he cannot get it back again. In delivering the judgment, Gibbs, C. J., said: "The infant avoided the lease when he came of age, as he had a perfect right to do; and, having avoided the lease, he brought this action for the money paid to the defendant, on the ground that the consideration having failed he was entitled to recover it; . . . but another question arises, namely, whether, supposing the lease to have been avoided, the plaintiff could recover the money which he has paid for it during his infancy. I confess this action is quite new to me, and I thought, on principle, that it could not be maintained. . . I think further, that, supposing this money to be the sole property of the infant, he cannot recover. He may, it is true, avoid the lease; he may escape the burthen of the rent, and avoid the covenants; but that is all he can do. He cannot, by putting an end to the lease, recover back any consideration which he has paid for it; the law does not enable him to do that." In *Warwick v. Bruce*, 2 Mau. & S. 205, 209, which was an action by an infant for breach of contract, on which the infant paid £40, Lord Ellenborough seems to have had the same principle in view when he says: "It occurred to me at the trial, on the first view of the case, that as an infant could not trade, and as this was an executory contract, he could not maintain an action for the breach of it; but if I had adverted to the circumstance of its being in part executed by the infant, for he had paid £40, and therefore it was most immediately for his benefit that he should be enabled to sue upon it, *otherwise he might lose the benefit of such payment*, I should probably have held otherwise." Another case, which seems to have escaped

the notice of the American courts which have discussed the question, as they have done quite elaborately, is *Ex parte Taylor*, 4 W. R. 305. An infant paid £1200 to B. & R. for a partnership interest in their business, and, before attaining his majority, he received about £200 out of the business. When he reached full age he repudiated the contract, and B. & R. subsequently becoming insolvent, he sought to prove against their estate. The proof having been rejected, on appeal the decision was affirmed. Knight Bruce, L. J., said that as there was no proof offered of fraud on the part of the petitioner or his advisers, the case solely depended on the question of the validity or invalidity of a contract by an infant, so far as any such contract could be valid. This was a contract entered into, so far as a contract could be entered into by a minor, during his minority, and acted on by him and the other side during his minority. Under these circumstances his lordship was of opinion that, if the bankrupts had continued solvent, and an action had been brought against them by the minor, either before or after he has attained his majority, to recover the money in question, or any part of it, the action would have ended in a nonsuit, or a verdict against him. That, in his opinion, would decide the question, and he considered that the order of the registrar had correctly disposed of it by his refusal to admit the proof. Turner, L. J., said: "There could be no doubt that an infant was not absolutely bound by a contract, and that he had a right to elect, when of age, whether he would affirm or disaffirm it. But it was another question whether, when money had been paid by him, he could recover back the money so paid. The one question depended merely upon the principle of the obligations which might be incurred by infants; the other case involved other principles. The cases which were referred to had, he thought, determined the question against the claimant. Nothing could be more strong than what was said by Lord Kenyon in the case of *Wilson v. Kearse*, 2 Peake, 196. The case of *Holmes v. Blogg*, 8 Taunt. 508, was equally decisive. He thought that the claim of the appellant was rightly rejected, and that the appeal must be dismissed." We find that this case is also reported in 8 De G. M. & G. 254, where Turner, L. J., seems to have used stronger language than as reported in 4 W. R. 305. He is there thus reported: "If an infant buys an article which is not a necessary, he cannot

has long been settled that the deed of an infant, being an executed contract, is only voidable at his election; that it is not

be compelled to pay for it; but if he does pay for it during his minority he cannot on attaining his majority recover the money back." Turner, L. J., is similarly reported in 25 L. J. B. 36 (A. D. 1856).

The case of *Corpe v. Overton*, 10 Bing. 252, makes a distinction which, while it leaves the holding in that case not inconsistent with the actual holding in *Holmes v. Blogg*, 8 Taunt. 508, and in *Ex parte Taylor* (*supra*), is neither in accord with the *ratio decidendi* of *Wilson v. Kearse*, 2 Peake, 196, nor with the *dicta* of Lord Kenyon in that case; of Lord Mansfield in *Drury v. Drury*, 2 Eden, 38, 71; of *Gibbs, C. J.*, as quoted by us in *Holmes v. Blogg*; nor with that of *Turner, L. J.*, in *Ex parte Taylor* (*supra*). In *Corpe v. Overton*, a minor paid £900 additional as the consideration for a partnership interest in the defendant's business. The minor, having rescinded the agreement, brought an action for his deposit. *Alderson, J.*, held that the plaintiff could recover back his deposit, because it was obtained by fraud. The court held that, ignoring fraud, the plaintiff was still entitled to recover back the deposit, as, unlike the case of *Holmes v. Blogg*, 8 Taunt. 508, there was a total failure of consideration; the minor having taken no benefit under the contract. *Corpe v. Overton*, 10 Bing. 252, is distinguishable from *Ex parte Taylor*, 8 De G. M. & G. 254, on the same ground. But it must be considered as not only differing from the *dicta* we have named, but as overruling *Wilson v. Kearse*, 2 Peake, 196. In that case, as in *Corpe v. Overton*, a deposit was made on a consideration which totally failed, the minor having taken no benefit under the contract; and Lord Kenyon held that the infant could not recover back his deposit. In *Holmes v. Blogg*, 7 Taunt. 511, *Gibbs, C. J.*, had this remark: "What is the point here? That an infant, having paid money on a valuable consideration, and having partially enjoyed the consideration, seeks to receive it back."

There is, however, some authority in England directly opposed to the *dicta* of Lords Mansfield and Kenyon, which escaped their notice. Thus it is laid down in *Viner's Ab. tit. Enfant*, D. 28, — "Money paid by an infant with his own hands in consideration of an horse agreed to be sold him for that and a further sum, is but voidable, to be recovered again by an action of account." And in *Austin v. Gervais*, Hob. 77, pl. 98, it was moved that the consideration of the money paid in hand by the plaintiff, being an infant,

was void; to which *Hobart, C. J.*, answered: "That because it was delivered by his own hands, it was but voidable, to be recovered again by an action of account." Treating, then, the *visi prius* case of *Wilson v. Kearse*, 2 Peake, 196, as being overruled, and the *dicta* of Lords Mansfield, Kenyon, and the others repeating them, as not having been stated with sufficient care, we would, from the English authorities, deduce the rules:—

1. Where an infant has paid money under a contract, from which he has derived no benefit, he may, on rescinding the contract, recover back his money as on a contract the consideration for which has entirely failed. *Viner's Ab. tit. Enfant*, D. 28; *Austin v. Gervais*, Hob. 77 pl. 98; *Corpe v. Overton*, 10 Bing. 252; overruling *Wilson v. Kearse*, 2 Peake, 196. See, as to the same principle involved, *Eichholz v. Bannister*, 17 C. B. N. S. 708; *Chapman v. Speller*, 14 Q. B. 621; *Devaux v. Camally*, 8 C. B. 640; *Giles v. Edwards*, 7 T. R. 181; *Walstab v. Spottiswoode*, 15 M. & W. 501; *Mowatt v. Lord Londesborough*, 4 E. & B. 1; *Johnson v. Goslett*, 3 C. B. N. S. 569; *Moore v. Garwood*, 4 Ex. 681; *Watson v. Earl Charnemont*, 12 Q. B. 856; *Mosely v. Cressy's Co.*, L. R. 1 Eq. 405; *Allison's Case*, L. R. 9 Ch. 24; *Westropp v. Solomon*, 8 C. B. 345; *Young v. Cole*, 3 Bing. N. C. 724; *Jones v. Ryde*, 7 Taunt. 488; *Gurney v. Wainersley*, 4 E. & B. 133; *Moeser v. Wisker*, L. R. 6 C. P. 120; *Dykes v. Blake*, 4 Bing. N. C. 463; *Gibson v. D'Este*, 2 Y. & C. 542.

2. But where an infant has paid money on a contract which he afterwards rescinds, but has taken some benefit under it, there, there not being a complete failure of the consideration, he cannot recover his money back. *Holmes v. Blogg*, 8 Taunt. 508; *Ex parte Taylor*, 8 De G. M. & G. 254; 4 W. R. 305; 25 L. J. B. 36. See, as to the same principle of partial failure of consideration, *Ex parte Barrell*, L. R. 10 Ch. 512; *Thomas v. Brown*, 1 Q. B. Div. 714; *Blackburn v. Smith*, 2 Ex. 783; *Hunt v. Silk*, 5 East, 449; *Harmor v. Graves*, 15 C. B. 667; *Chapman v. Morton*, 11 M. & W. 534. See also *Moses v. Stevens*, 2 Pick. 332; *Gaffney v. Hayden*, 110 Mass. 137; *Breed v. Judd*, 1 Gray, 455.

The law in this country is thoroughly established in accordance with the rules we have deduced as the *ratio decidendi* of the English cases, as a whole. There are a few old cases where the courts, like the mass of the text-writers, were led astray

void. It operates to transmit the title. And there are some cases in which such a deed is held to be not even voidable. They are those in which the infant, by making the conveyance, does only what the law would have compelled him to do.¹ Whether this was such a deed need not be considered, for conceding that it was not, clearly it was not void." And the court sustained the following instructions in the court below: "The question here is not whether there has been an avoidance. The defence is that the deed has been ratified by the plaintiff. I am of the opinion that the ratification should be, if not equally solemn, of a clear and unequivocal character, showing the intention of the party to confirm the deed. An avoidance may be by a deed to a third party or, as held in this country, in other ways. But the deed from the plaintiff to the defendant was not void. It was simply voidable, and passed the title absolutely until by some adequate act he affirmed it. The question, is, has it been disaffirmed or ratified by the plaintiff since he came of age? All the facts in proof, such as leasing part of the property (from his grantee), remaining in the vicinity a long time without asserting his claim while valuable improvements were being put on the property, are to be considered by the jury in deciding whether there has been a ratification by the plaintiff; but mere acquiescence does not amount to a ratification. The authorities are somewhat conflicting as to what is necessary to constitute an avoidance. Lord Lyndhurst was of opinion that a deed was necessary to avoid a deed given while under age. I think that this doctrine is perhaps sound, and ought to have been held in this country; but it has been held in this country that an infant may avoid his deed by

by the *dicta* in the English cases to which we have referred, but those cases have all been expressly overruled, and are without authority. One of them is *Harney v. Owen*, 4 Blackf. (Ind.) 336, where it was held that a minor who rescinded a contract for his services, could not recover for the portion of the time in which the services were rendered. The same doctrine was held in New Hampshire, in *Weeks v. Leighton*, 5 N. H. 343; and in New York, in *McCoy v. Huffman*, 8 Cow. 84.

In Indiana, in *Dallas v. Hollingsworth*, 3 Ind. 537, *Harney v. Owen*, 4 Blackf. 336, was overruled. In New Hampshire, *Weeks v. Leighton*, 5 N. H. 343, was expressly overruled; and in New York, *McCoy v. Huffman*, 8 Cow. 84, has been repeatedly overruled. See *Millard v. Hewlett*, 19 Wend. 301; *Medbury v. Watrous*, 7 Hill, 110, and *Whitmarsh v. Hall*, 3 Den. 375.

With the overruling of these cases the American law is in entire accord with the rules we have laid down. See *Willis v. Twambly*, 13 Mass. 204; *Vent v. Osgood*, 19 Pick. 572; *Breed v. Judd*, 1 Gray, 455; *Gaffney v. Hayden*, 110 Mass. 137; *Judkins v. Walker*, 17 Me. 38; *Thomas v. Dike*, 11 Vt. 273; *Peters v. Lord*, 18 Conn. 337; *Wheatley v. Miscal*, 5 Port. (Ind.) 142; *Robinson v. Weeks*, 56 Me. 102; *Derocher v. Continental Mills*, 58 Me. 217; *Riley v. Mallory*, 33 Conn. 201; *Shurtleff v. Millard*, 12 R. I. 272; *House v. Alexander*, 105 Ind. 109. See also *Grace v. Hale*, 2 Humph. (Tenn.) 27; *Williams v. Norris*, 1 Litt. (Ky.) 157; *Smith v. Evans*, 5 Humph. (Tenn.) 70; *Roberts v. Wiggins*, 1 N. H. 73; *Hamblet v. Hamblet*, 6 N. H. 337; *Fitts v. Hall*, 9 N. H. 441; *Co. Litt.* 51 b.; 4 Cr. Dig. 142.

¹ *Zouch v. Parsons*, 3 Burr. 1794.

going upon the land, or by bringing suit, etc. It is the act of avoidance, and not that of the ratification, which the law requires to be equally solemn with the conveyance.”¹

Where an infant is sued for the price of goods supplied to him on credit, he may, for the purpose of showing that they were not necessities, give evidence that, when the order was given, he was already sufficiently supplied with goods of a similar description, and it is immaterial whether the plaintiff did or did not know of the existing supply.²

Where a promise of marriage was made by the defendant after he became twenty-one years of age, who had been engaged to the plaintiff during his infancy, to be married to her; the judge left it to the jury to say whether the promise was a new one or a ratification of the old promise, and the jury having found that it was a new promise; the court, having held that it was a question of intention whether the defendant intended to make a new promise or to affirm the old one, and that it was properly left to the jury as a question of fact, sustained the verdict.³

L. transferred fifty shares in a company into the name of H., an infant, not known by him to be such, who was also the transferee of a large number of other shares in the same company. H. was registered as the holder. H. attained twenty-one more than five months before the winding-up order, and in the interval, transferred some of the other shares. He was settled on the list of contributories for the remaining shares, and did not, at first, raise the defence of his having been an infant, but, four months afterwards, took out a summons to have his name taken off the list on that ground. The official liquidator then applied to have

¹ On an infant's ratification of his voidable contract, see *Cresinger v. The Lessee of Welch*, 15 Ohio, 193; *Drake v. Ramsey*, 5 Ohio, 251; *Ferguson v. Bell*, 17 Mo. 347; *Bostwick v. Atkins*, 3 Comst. 53; *Wheaton v. East*, 5 Yerg. 41-62; *Wallace's Lessee v. Servis*, 4 Harrington, 75; *Hartman v. Kendall*, 4 Ind. 405; *Cohen v. Armstrong*, 1 M. & S. 724; *Williams v. Moor*, 11 M. & W. 256; *Harris v. Wall*, 1 Ex. 206; *Rowe v. Hopwood*, L. R. 4 Q. B. 1; *Maccord v. Osborne*, 1 C. P. Div. 568; *Hartley v. Wharton*, 11 A. & E. 934; *Hunt v. Massey*, 5 B. & Ad. 902; *Cole v. Saxby*, 3 Esp. 160; *Tanner v. Smart*, 6 B. & C. 603; *Baylis v. Dinely*, 3 M. & S. 477; *Cornwall v. Hawkins*, 41 L. J. C. 435; *Stokes v. Brown*, 3 Pinney, 311.

² *Barnes v. Toye*, 13 Q. B. D. 410. And see *Burghart v. Angerstein*, 6 C. & P. 690; *Ford v. Fothergill*, 1 Esp. 211; *Cook v. Deaton*, 3 C. & P. 114; *Steedman v. Rose*,

Car. & M. 422; *Brayshaw v. Eaton*, 5 Bing. N. C. 231; *Dalton v. Gibb*, 5 Bing. N. C. 198; *Bainbridge v. Pickering*, 2 W. Blk. 1325. And see p. 120, *ante*, and note 1.

³ *Northcote v. Doughty*, 4 C. P. D. 385. In this case the Infants' Relief Act, 1874, was relied on, and it was admitted that the statute applies to contracts of marriage, and that, therefore, if the promise amounted to a ratification merely, and not to a new promise, it was not binding, and that the question was well left to the jury. The following cases bear on the point: *Coxhead v. Mullis*, 3 C. P. Div. 439; *Maccord v. Osborne*, 1 C. P. Div. 568; *Harris v. Wall*, 1 Ex. 122; *Hutton v. Mansell*, 3 Salk. 16; *Thrupp v. Fielder*, 2 Esp. 627; *Cole v. Cattingham*, 8 C. & P. 75; *Harvey v. Johnston*, 6 C. B. 295; 6 D. & L. 120; *Carter v. Scargill*, L. R. 10 Q. B. 564.

the name of L. placed on the list instead of that of H. in respect of the fifty shares. It was held, a transfer to an infant being not void but only voidable, that, affirming the decision of the Master of the Rolls, H. must be held to have affirmed the transaction after he came of age, and that the application must be refused.¹

But where shares had been transferred to an infant, and his name had been placed on the register, the company being ignorant of the fact of his infancy, and he did not come of age until after the winding up, it was held, affirming the judgment of Stuart, V. C., that the official liquidator might refuse to accept him as a shareholder, although after coming of age he was willing to confirm the transfer.² To the same effect is *Castello's case*.³ But these questions arise under the 131st section of the English Companies' Act, rendering the transaction with an infant void, because there must be a transferee on the register who can be made liable in respect to the shares transferred. This does not affect the general doctrine that an infant's contract is not void but voidable, subject to acceptance or rejection by the infant on his coming of age, and binding on the other party to the contract or not, at the election of the infant.⁴

Still, even in these Companies' cases, where, after the infant has come of age, he acquiesces in the contract, and the company are willing, the infant then becomes bound, because it is then, in effect, a new contract between the company and one of age. Thus, in *Ebbett's case*⁵ an infant was held bound by his acquiescence, where, on his application, shares were allotted to him, which, subsequent to his coming of age, he dealt with as his own.⁶

¹ *Blackely Ordinance Co. v. Lumsden's Case*, L. R. 4 Ch. Ap. 81. In this case it was held that an infant's contract is not void, but voidable merely, and that a transfer of stock to an infant is not, *ipso facto*, a nullity. See, as explained by this case, *Curtis's Case*, L. R. 6 Eq. 455; *Shewell's Case*, L. R. 2 Ch. 387; *Capper's Case*, L. R. 3 Ch. 458; *Mann's Case*, *Id.* 459, n.; *Harris's Case*, L. R. 6 Eq. 512; *Reid's Case*, 24 Beav. 318; *Litchfield's Case*, 2 De G. & S. 141.

² *Simon's Case*, *Id.* *re Asiatic Banking Co.*, L. R. 5 Ch. Ap. 298. See, in addition to the cases cited in the previous note, *Lumsden's Case*, L. R. 4 Ch. 31; *Parson's Case*, L. R. 5 Eq. 656; *Wilson's Case*, L. R. 5 Eq. 240; *Hennessey's Case*, 3 De G. & Sm. 191. And see other cases, *note*, Part VI., on Sales of Shares of Stock.

³ L. R. 5 Eq. 504.

⁴ *Oliver v. Houlden*, 13 Mass. 237;

Nightingale v. Withington, 15 Mass. 272; *Worcester v. Eaton*, 13 Mass. 371; *Van Bramer v. Cooper*, 2 Johns. 279; *Hartness v. Thompson*, 5 Johns. 160; *Rose v. Daniel*, 3 Brev. (S. C.) 438; *Brown v. Colliwell*, 10 S. & R. 114; *Strain v. Wright*, 7 Ga. 568; *Bryan v. Walton*, 14 Ga. 185; *Baker v. Lovett*, 6 Mass. 78; *Slocum v. Hooker*, 13 Barb. 536.

⁵ L. R. 5 Ch. Ap. 302.

⁶ Such an election must, however, not be made by an infant ignorant of his legal position, and can only be made by one cognizant of his rights. *Tucker v. Sanger*, *McClell*, 439; 13 Price, 607; *Buttrick v. Broadhurst*, 1 Ves. Jr. 175; 3 Bro. C. C. 88; *Whistler v. Webster*, 2 Ves. Jr. 367; *Wake v. Wake*, 1 Ves. Jr. 335; *Archer v. Pope*, 2 Ves. Sen. 523; *Tomkyns v. Ladbrooke*, *Id.* 592, 593; *Harvey v. Ashley*, 3 Ark. 615; *Pawlett v. Delaval*, 2 Ves. Sen. 670; *Duke of Northumberland v. Aylesford*, *Ambl.* 540; *Stratford v. Powell*,

But, when, as in Weston's case,¹ and as in many other cases,² the shares are bought by an adult and registered in the name of an infant, the adult is liable to be placed on the list as a contributor.

The English act (9 Geo. 4, c. 14, s. 5.), like the acts in this country, enacts that the "promise or ratification" of the contract by an infant must be made by him in writing after attaining full age. In *Rowe v. Hopwood*,³ goods, being wines, for which he was not liable as necessities, having been supplied by the plaintiff to the defendant whilst the defendant was an infant; when he came of age an account with the items and prices was submitted to him, at the foot of which he signed the following: "Particulars of account to the end of 1867, amounting to £162 11s. 6d., I certify to be correct and satisfactory." The Court of Queen's Bench held, that this did not amount to a recognition of the debt as an existing liability so as to be a ratification of the contract within the statute. Cockburn, in delivering judgment, laid down the following principles as governing the case: "The statute requires a ratification in writing of a debt incurred by a person under age, and the written document necessary as the foundation of an action against the debtor after he has attained his majority is for the court and not for the jury. Therefore, it is for us to say whether this written document is a sufficient ratification. I think it is not; for I entirely concur in the view adopted by the Court of Exchequer in *Harris v. Wall*,⁴ that in order to be a ratification there must be a recognition by the debtor, after he has attained his majority, of the debt as a binding debt upon him. Is this document such as to amount to a recognition of an existing liability? I do not think that it is. What it comes to is this: An account is submitted to the defendant after he is of full age, which contains a statement of goods supplied

1 Ball & B. 24; *Giddings v. Giddings*, 3 Russ. 241; *Curtis v. Patton*, 11 S. & R. 305; *Hinely v. Margarity*, 3 Penn. 428; *Ordinary v. Wherry*, 1 Bail. (S. C.) 28; *Norris v. Vance*, 3 Rich. 164. Where an infant elects to affirm a contract, he must affirm it as a whole. He cannot affirm it in part and avoid it in part. *Bigelow v. Kinney*, 3 Vt. 353; *Morrill v. Aden*, 19 Vt. 505.

If he retain property purchased under a contract, he cannot under a plea of infancy avoid paying for it. *Henry v. Root*, 33 N. Y. 526; *Forsyth v. Hastings*, 27 Vt. 646; *Bartholomew v. Finmore*, 17 Barb. 428; *Strain v. Wright*, 7 Ga. 568; *Bailey v. Bainberger*, 11 B. Mon. (Ky.) 113; *Hill v. Anderson*, 13 Miss. 216;

Kitchen v. Lee, 11 Paige, 107; *Hillyer v. Barnett*, 3 Edw. 222; *Oltman v. Mack*, 3 Sandf. Ch. 431; *Kilgore v. Jordan*, 17 Tex. 341. See as to acts of ratification, *Emmons v. Murray*, 16 N. H. 385; *Kline v. Beebe*, 6 Conn. 494; *Wimberley v. Jones*, 1 Ga. Dec. 91; *Hartman v. Kendall*, 4 Ind. 403; *Boody v. McKenney*, 23 Me. 517; *Levering v. Heighe*, 2 Md. Ch. 81; *Williams v. Mobee*, 7 N. J. Eq. 500; *Wheaton v. East*, 5 Verg. 41; *Summers v. Wilson*, 2 Coldw. 469.

¹ L. R. 5 Ch. Ap. 614.

² *Capper's Case*, L. R. 3 Ch. Ap. 458; *Mann's Case*, *Id.* 459, n. And many other cases to the same effect.

³ L. R. 4 Q. B. 1.

⁴ 1 Ex. 122.

during his infancy; he is asked to sign it, and he put his signature to the words, 'I certify the account to be correct and satisfactory.' I understand these words to mean that the items are properly set out, and the sums charged in respect of these items satisfactory. I do not think the words mean more than that. There ought to be, at least on the part of the debtor, an admission of an existing liability, and we ought not to strain the meaning of the words in the document signed by the debtor, so as to defeat the operation of the statute passed for his protection." The other judges concurred.¹

In *Maynard v. Eaton*,² E. through his broker purchased shares, and had them placed in the name of his son, an infant; the seller not being aware of the infancy. Soon afterwards, the company was wound up voluntarily, and the infant brought an action, by his next friend, against the plaintiff, who was an auditor of the company, charging him with fraud in selling the shares, knowing that the company was in an insolvent condition, and claiming damages. There was no allegation of infancy, and the action was not sought to be sustained on that ground. The action was compromised on the terms that all charges of fraud should be withdrawn, and that the purchase-money should be repaid the

¹ And see *Hartley v. Wharton*, 11 A. & E. 934; *Mawson v. Beane*, 10 Ex. 206; *Hunt v. Massey*, 5 B. & Ad. 902; *Lobb v. Stanley*, 5 Q. B. 574; *Williams v. Moor*, 11 M. & W. 256; *Cohen v. Armstrong*, 1 M. & Sel. 724; *Whippy v. Hillary*, 3 B. & Ad. 399; *Hart v. Prendergast*, 14 M. & W. 741; *Hinely v. Margarity*, 3 Barr. 428; *Martin v. Mayo*, 10 Mass. 137; *Gay v. Ballow*, 4 Wend. 403; *Millard v. Howlett*, 19 B. 301; *Thompson v. Lay*, 4 Pick. 48; *Pearce v. Tobey*, 5 Met. 168; *Everson v. Campbell*, 17 Wend. 419.

The authorities in this country are very generally in accord with the holding in *Rowe v. Hopwood*, 1 L. R. 4 Q. B. 1. See the authorities cited in the previous note, and see *Smith v. Mayo*, 9 Mass. 62, 64; *Whitney v. Dutch*, 14 Mass. 457, 460; *Ford v. Phillips*, 1 Pick. 202; *Barnaby v. Barnaby*, 1 Pick. 221, 223; *Thompson v. Lay*, 4 Pick. 48; *Wilcox v. Roath*, 12 Conn. 550; *Goodsell v. Myers*, 3 Wend. 479; *Procter v. Sears*, 4 Allen, 95; *Edgerley v. Shaw*, 25 N. H. 514; *Taft v. Sergeant*, 18 Barb. 320; *Ackerman v. Runyon*, 1 Hilt. (N. Y.) 169; *Alexander v. Hutcheson*, 2 Hawks (N. C.), 535; *Martin v. Byrom*, *Dudley* (Ga.), 203; *Armfield v. Tate*, 7 Ired. L. 258; *Reed v. Bosbears*, 4 Sneed, 118; *Buckner v. Smith*, 1 Wash. (Va.) 295; *Stokes v. Brown*, 4 Chand. (Wis.) 39; *Burdett v. Williams*, 30 Fed. Rep.

697; *Baker v. Kennett*, 54 Mo. 82. In this last cited case the court said: "The rule is well settled, that, to constitute a ratification of an infant's contract, a mere acknowledgment that the debt existed or that the contract was made is not sufficient. There need not be a precise and formal promise, but there must be a direct and express confirmation, and a substantial promise to pay the debt or fulfil the contract. The promise must be made with a knowledge of the facts, with a deliberate purpose of assuming a liability from which he knows he is discharged by law." And see *Highley v. Barron*, 49 Mo. 163; *Owens v. Phelps*, 95 N. C. 286; *Howard v. Simpkins*, 70 Ga. 322; *Petty v. Roberts*, 7 Bush (Ky.), 410; *Robinson v. Hoskins*, 14 Bush, 393; *Philpot v. Sandwich Manuf. Co.*, 18 Neb. 54; *Necker v. Koehn*, 21 Neb. 559. An infant cannot retain personal property purchased, and plead infancy as a defence to a note given for it. See prior cases, and see *Delano v. Blake*, 11 Wend. 85; *Jones v. Phoenix Bank*, 4 Seld. 228; *Kitchen v. Lee*, 11 Paige, 107. See, as to his mere acknowledgment, *Bennett v. Calkins*, 52 Conn. 1, not amounting to a promise. In *Owen v. Long*, 112 Mass. 403, an infant's ratification of his signing a promissory note as surety was held binding.

² L. R. 9 Ch. App. 414.

infant. The liquidators, on discovering the infancy, substituted the name of the plaintiff for his, as a contributory to the company. The plaintiff then filed a bill against E., charging that he was the real purchaser of the shares, and that the plaintiff was not aware of that fact when he entered into the compromise with the infant, and claiming to be indemnified by E. against all loss in respect of the transaction. Malins, V. C., held that the plaintiff was entitled to be indemnified, and that he was not precluded from maintaining the suit by the compromise with the infant. His decision was, however, reversed on appeal, the question of infancy having had nothing to do with the compromised suit; and the infant having sued by his next friend, there was neither concealment of truth nor suggestion of what was false relating to the compromise matter; the action having been simply brought for a rescission of the contract, and whether the beneficial owner was the father or the son was wholly irrelevant. The plaintiff's bill was dismissed.

In October, 1865, C. purchased shares in a company, and had them transferred to B. as a trustee for him, and B.'s name was put on the register. In March, 1866, the company was ordered to be wound up. At the time of the transfer B. was an infant, and he did not come of age till September, 1867. In December, 1867, B.'s name was settled on the list of contributories; and in January, 1868, a call was made, notice of which was sent to B. On receipt of the notice, B. repudiated the shares, and the official liquidator took out a summons to remove his name from the list, but, afterwards, abandoned the summons. In April, 1871, B., at the request of the official liquidator, wrote a letter authorizing him, in consideration of his not proceeding against B. under the call, to use B.'s name in taking proceedings against C., the real owner of the shares. Afterwards B. took out a summons to have his name removed from the list of contributories; it was held, affirming the decision of Lord Romilly, M. R., that the letter of April, 1871, did not operate as a retraction of B.'s repudiation of the shares; and that his name must be removed from the list of contributories.¹

¹ *In re Contract Corporation*, Baker's Case, L. R. 7 Ch. Ap. 115. As to acts of repudiation by an infant, see *Cork & Bandon Ry. Co. v. Cazenove*, 10 Q. B. 935; *Dublin & Wicklow Ry. Co. v. Black*, 8 Ex. 181; *Mitchell's Case*, L. R. 9 Eq. 363; *Ebbett's Case*, L. R. 5 Ch. 302; *Holmes v. Blogg*, 8 Taunt. 35; *Tucker v. Moreland*, 10 Pet. 58; *Pitcher v. Lycock*, 7 Ind. 398; *Peterson v. Laik*, 24 Mo. 541; *Jack-*

son v. Carpenter, 11 Johns. 539; *Jackson v. Burchin*, 14 Johns. 124; *Hoyle v. Stone*, 2 Dev. & B. L. 320; *Cresinger v. Welch*, 15 Ohio, 156; *McGau v. Marshall*, 7 Humph. 121; *White v. Flora*, 2 Overt. (Tenn.) 426; *Heath v. West*, 26 N. H. 191; *Shipman v. Haton*, 17 Conn. 481; *Walker v. Ellis*, 12 Ill. 470; *Moore v. Abernathy*, 7 Blackf. 442; *Carr v. Clough*, 26 N. H. 280; *Grace v. Hale*, 2 Humph.

G., a shareholder in a limited company, transferred his shares to A., an infant, more than a year before the company was wound up. A. transferred to D., also an infant, who transferred to B. three months before the winding up. The transfers were all registered. B., who was *sui juris* at the date of the transfer, afterwards became bankrupt. It was claimed, that, under section 38 of the English Companies' Act, 1862, B. having become bankrupt, G. was liable as a shareholder; and the court so held, and that he continued liable as a member till B.'s transfer was registered, and must be placed on the list of contributories as a past shareholder.¹

The question of the liability of an agent who purchased shares of stock and furnished the name of one who was afterwards ascertained to be an infant, was elaborately examined in *Merry v. Nickalls*.² The decision was on the basis that, having given the name of an infant, who was not liable, he had, in fact, given no name at all, and he was himself liable as principal; and this, although the time limited by the rules of the stock exchange for objecting to a proposed transferee had expired without any such objections having been made.³

Infancy is a bar to an action by an owner against his supercargo for breach of instructions; but not to an action of trover for the goods. Still, however, infancy may be given in evidence

27. In *Bingham v. Barley*, 55 Tex. 281, the court said: "We think the proper rule that must prevail, in harmony with the decisions and all circumstances in the conflict of authority upon the subject of the rights and duties of the minor, who, after coming of age, would avoid his deed made during his minority, is this: that he shall be held to do so within a reasonable time; that his silence or acquiescence beyond such reasonable time should conclude him from disaffirming it, and that what is a reasonable time is such a period as in view of the attending facts would rebut any presumption of an intended disaffirmance. The silence or non-claim of the minor for a considerable length of time, though less than the period of limitation, may as effectually prove his affirmance or ratification in connection with the circumstances of the case, as his express acts or declarations to that effect." See further, as to infant's avoidance of his contracts, *Hoyt v. Wilkinson*, 57 Vt. 404; *Price v. Furman*, 27 Vt. 268; *Person v. Chase*, 37 Vt. 648; *Abell v. Warren*, 42 Vt. 720; *Willis v. Twambly*, 13 Mass. 204; *Betts v. Carroll*, 6 Mo. App. 518; *Heath v. West*, 28 N. H. 108; *Cogley v. Cushman*, 16 Minn. 402; *Skinner v. Maxwell*, 66 N. C. 45; *Kitchen v. Lee*, 11 Paige, Ch. 108; *Kerr v. Bell*, 44 Mo. 120; *Towle v. Dresser*, 73 Me. 252;

Bryant v. Pottinger, 6 Bush (Ky.), 473; *House v. Alexander*, 105 Ind. 109; *Dill v. Bowen*, 54 Ind. 204; *Carpenter v. Carpenter*, 45 Ind. 142; *Hayes v. Parker*, 41 N. J. Eq. 630; *St. Louis, &c. Ry. v. Higgins*, 44 Ark. 293; *Stiff v. Keith*, 143 Mass. 224; *McCarthy v. Henderson*, 138 Mass. 310; *Page v. Morse*, 128 Mass. 99; *Bennett v. McLaughlin*, 13 Ill. App. 349; *Hall v. Butterfield*, 59 N. H. 354; *Bartlett v. Bailey*, 59 N. H. 408; *Brantley v. Wolf*, 60 Miss. 420.

¹ *In re Contract Corporation*, *Gooch's Case*, L. R. 14 Eq. 454.

² L. R. 7 Ch. Ap. 733.

³ In this case the decision of *Bacon, V.C.*, who followed *Rennie v. Morris*, L. R. 13 Eq. 203, holding *contra*, was reversed, and *Rennie v. Morris* was overruled, *Maxted v. Paine*, L. R. 4 Ex. 81, being approved. See an elaborate judgment on the same subject by *Blackburn, J.*, in *Maxted v. Paine* (2nd action), L. R. 6 Ex. 132. See further on the question, *Grissell v. Bristowe*, L. R. 4 C. P. 36; *Coles v. Bristowe*, L. R. 4 Ch. 3; *Cruse v. Paine*, *Id.* 441; *Allen v. Graves*, L. R. 5 Q. B. 478; *Bowring v. Shepherd*, L. R. 6 Q. B. 309; *Paine v. Hutchinson*, L. R. 3 Ch. 388; *Sheppard v. Murphy, Jr.* L. R. 1 Eq. 590.

in an action of trover upon the plea of not guilty; not as a bar, but to show the nature of the act which is claimed to be a conversion. An infant is liable in trover, although the goods were delivered to him under a contract.¹

¹ Vasse v. Smith, 6 Cranch, 226.

In Bac. Ab. tit. *Infancy*, it is laid down, "If an infant without any contract wilfully takes away the goods of another, trover lies against him. Also, it is said, that if he takes the goods under pretence that he is of full age trover lies, because it is a wilful and fraudulent trespass."

An infant is liable for his wilful torts, and for damages for frauds committed by him; but no fraudulent representation made by an infant can give validity to any contract entered into by him which would otherwise be voidable for his infancy. The action must in all cases arise solely upon the tort or wrong committed by him. Studwell v. Shapter, 54 N. Y. 249; Vasse v. Smith, 6 Cranch, 226; Eckerstein v. Frank, 1 Dalv, 334; Heath v. Mahoney, 14 N. Y. Sup. Ct. 100; Eaton v. Hill, 50 N. H. 235. In Fitts v. Hall, 9 N. H. 441, Parker, C. J., deduced from the authorities this principle: that if the tort or fraud of an infant arises from a breach of contract, although there may have been false representations or concealment respecting the subject-matter of it, the infant cannot be charged for this breach of his promise or contract by a change of the form of action. But if the tort is subsequent to the contract, and not a mere breach of it, but a distinct, wilful, and positive wrong of itself, then, although it may be connected with a contract, the infant is liable. But if one affirms himself of full age when he is an infant, and thereby procures a contract to be entered into, he is chargeable in damages for a fraudulent misrepresentation whereby another has received damage. Thus a representation that the defendant is of full age is not part of the contract, nor does it grow out of the contract, or in any way result from it. It is not any part of its terms, nor is it the consideration upon which the contract is founded. No contract is made about the infant's age. The sale of goods is not a consideration for this affirmation or representation. The representation is not a foundation for an action of assumpsit. The matter arises purely *ex delicto*. The fraud is intended to induce and does induce the other party to make a contract, but that by no means makes it part and parcel of the contract. It is antecedent to the contract; and if an infant is liable for a positive wrong connected with a contract, but arising after the contract has been made, he may well

be answerable for one committed before the contract was entered into, although it may have led to the contract. See Homer v. Thwing, 3 Pick. 492; Mills v. Graham, 4 B. & P. 140; Bristow v. Eastman, 1 Esp. 172; Badger v. Phinney, 15 Mass. 359; Livermore v. Herschell, 3 Pick. 33, 36; Eaton v. Hill, 50 N. H. 235; Matthews v. Cowan, 59 Ill. 341; Hayes v. Parker, 41 N. J. Eq. 630; Carpenter v. Carpenter, 45 Ind. 142; Rice v. Boyer, 108 Ind. 472; Nolan v. Jones, 53 Iowa, 387; Lewis v. Littlefield, 15 Me. 233; Walker v. Davis, 67 Mass. 506; Baxter v. Bush, 29 Vt. 465; Green v. Sperry, 16 Vt. 392; Hughes v. Gallans, 10 Phila. 618. In Rice v. Boyer, 108 Ind. 472, the court, in holding that where an infant fraudulently and falsely represents that he is of full age he is liable in an action *ex delicto* for the injury resulting from his tort, say: "This result does not involve a violation of the principle that an infant is not liable where the consequence would be an indirect enforcement of his contract, for the recovery is not upon the contract, as that is treated as of no effect; nor is he made to pay the contract price of the article purchased by him, as he is only held to answer for the actual loss caused by his fraud. In holding him responsible for the consequences of his wrong an equitable conclusion is reached, and one which strictly harmonizes with the general doctrine that an infant is liable for his torts. Nor does our conclusion invalidate the doctrine that an infant has no power to deny his disability, for it concedes this, but affirms that he must answer for his positive fraud."

In England the rule at law has been held that an infant cannot be made liable for a fraudulent representation that he was of full age, whereby the plaintiff was induced to contract with him. Price v. Hewett, 8 Ex. 146; Liverpool Adelphi Loan Assoc. v. Fairhurst, 9 Ex. 422; Johnson v. Pye, 1 Sid. 258; 1 Keb. 913. And see Jennings v. Rundall, 8 T. R. 335; Burnard v. Haggis, 14 C. B. N. S. 45; Wright v. Leonard, 11 C. B. N. S. 258; Bartlett v. Wells, 1 B. & S. 836; Dee Roo v. Foster, 12 C. B. N. S. 272. But in England, in the courts of equity and bankruptcy, the rule has been acted on, as it has generally been in the courts of law in this country. See Cory v. Gertchen, 2 Madd. 40; Wright v. Snowe, 2 De G. & S. 321; Eason v. Nicholas, 1 De G. & S. 118; Clarke v. Cobley, 2 Cox, 173; Clark v. Bedford, 13

Infancy is no defence to an action for money obtained by the infant by falsehood and fraud.¹

Vin. Ab. 536; Vaughan v. Vanderstegen, 2 Drew, 165, 369; Overton v. Bannister, 3 Hare, 503; 4 Beav. 205; Drury v. Drury, 4 Bro. C. C. 506; Beckett v. Cordley, 1 Bro. C. C. 352; *Ex parte* Watson, 16 Ves. 265; *Ex parte* Bates, 2 Mont. D. & D. 337; *Ex parte* The Unity Joint-Stock, &c. Assoc., 3 De G. & J. 63; Eyroy v. Nicholson, 2 Eq. Cas. Ab. 489; Earl of Buckinghamshire v. Drury, 2 Eden, 72.

In this country, in *Hayes v. Parker*, 41 N. J. Eq. 630, the court say: "It is, of course, true that at law the execution of this paper [a release] by the minor is voidable. Nor would his assertion, made at the time of his execution, that he was of age operate to change his position in a court of law. The fact that the infant had by his false representations led the other contracting party to negotiate and execute the contract, and injuriously change his position even, would in an action by the adult to enforce it be no answer to the plea of infancy. At law it is conclusively presumed that a person within the age is unfitted for business, and that every contract into which he enters is to his disadvantage, and that he is incapable of fraudulent acts which will estop him from interposing the shield of infancy against its enforcement. In equity, however, this rigid rule has its exceptions. Equity will regard the circumstances surrounding the transaction, the appearance of the minor, his intelligence, the character of his representations, the advantage he has gained by his fraudulent representations, and the disadvantage to which the person deceived has been put by him, in determining whether he should be permitted to invoke successfully the plea of infancy." See, further, *School District v. Bragdon*, 23 N. H. 507; *Oliver v. McClellan*, 21 Ala. 675;

Gindry v. Davis, 6 La. Ann. 91; *Christian v. Welch*, 7 La. Ann. 533; *Scott v. Watson*, 46 Me. 362; *Sikes v. Johnson*, 16 Mass. 389; *Wallace v. Morss*, 5 Hill, 391; *Conklin v. Thompson*, 29 Barb. 218; *Ward v. Vance*, 1 N. & McC. 257; *Humphrey v. Douglass*, 10 Vt. 71; *West v. Moore*, 14 Vt. 447; *Hutching v. Engel*, 17 Wis. 230.

The cases at law in this country seem to us to be more consistent with sound principle than the English. The latter rest on the basis that, as virtually in all contracts made by a minor, except for necessities, there is in the very fact of his undertaking to make a contract at all an actual or constructive fraud; to allow an action to be brought against an infant for the fraud would be, in effect, to take away all the protection with which he is clothed. But the decisions of both countries are in harmony that an infant cannot obtain a cancellation of his contract and retain the fruits of the contract. If he seek to annul his contract he must as far as possible restore the other party to the *status quo*; and if in repudiating the contract he cannot do this he cannot recover from the other contracting party the consideration which he himself has paid. So it would seem more consistent with the principle on which these decisions are based, that, although an action will not lie against him on contract, yet when through fraud he has obtained the money or property of the other contracting party, and pleads his infancy as a defence, thereby repudiating and disaffirming the contract, he should be compelled by a restoration of the money or property to remit the other party to the *status quo*. The contract is voidable, and if he elect to affirm it he can do so. But if he disaffirm it there would seem to be no sound reason why he should not, agree-

¹ *Catts v. Phalen*, 2 How. 376, 382; *Bullock v. Babcock*, 3 Wend. 391; *Hanks v. Deal*, 3 McCord, 257; *Green v. Sperry*, 16 Vt. 390; *Lewis v. Littlefield*, 15 Me. 233; *Hartfield v. Roper*, 21 Wend. 615, 620; *Brown v. Maxwell*, 6 Hill (N. Y.), 592, 594; *Homer v. Thwing*, 3 Pick. 492; *School Dist. v. Bragdon*, 3 Foster (N. H.), 516; *Walker v. Davis*, 1 Gray, 506; *Humphrey v. Douglass*, 10 Vt. 71; *Bristow v. Eastman*, 1 Esp. 172. And an infant will not be permitted to take advantage of his privilege to effect a fraud; and, upon avoidance of the contract, he will be compelled, upon equitable grounds, to make restitution of the benefits obtained under it. *Ex parte* Unity Banking Assoc., 3 De G. & J. 63; 27 L. J. B. 33; *Nelson v.*

Stocker, 4 De G. & J. 458; 28 L. J. C. 760. But, notwithstanding his fraud, an action will not lie against him on the contract, either to support the contract or for injuries resulting from its breach. *Johnson v. Pye*, 1 Lev. 169; 1 Keb. 913; *Price v. Hewett*, 8 Ex. 146; *Liverpool Adelphi Loan Assoc. v. Fairhurst*, 9 Ex. 422; *Wright v. Leonard*, 11 C. B. N. s. 253; *Bartlett v. Wells*, 1 B. & S. 836; *De Roo v. Foster*, 12 C. B. N. s. 272; *Stikanan v. Dawson*, 1 De G. & Sm. 90. And an infant is liable in assumpsit for money stolen, and for the proceeds of stolen property when converted into money. *Shaw v. Coffin*, 58 Me. 254. And see *Walker v. Davis*, 1 Gray, 506.

ably to the general trend of the decisions in this country, be made answerable for his tort, and be compelled to make restitution of the money or property of the other contracting party, exactly as he would have to do if he were himself taking proceedings for the cancellation of his contract. We think, decidedly, that the American cases generally, and the English decisions in equity and bankruptcy, are more consistent with sound principle than are the English decisions at law.

In the old case of *Savage v. Foster*, 13 Vin. Ab. 536, it was decided that it is not necessary that *femes covert* or infants be active in promoting a purchase if it appear that they were privy to it, and that it could not be done without their knowledge. There, A. had two daughters, B. and C. A. was tenant for life of lands, remainder to B., a *feme covert* in tail. On a treaty of marriage between J. S. and C., J. S. insisted on £1000, which A. could not give. B. and her husband encouraged the marriage, and solicited A. to convey the entailed lands to J. S. and C., which A. did. It was decreed after A.'s death that B. should be bound by the conveyance, and levy a fine on penalty of payment of costs; and a perpetual injunction was granted to J. S. and C. for quiet possession. In *Drury v. Drury*, 4 Bro. C. C. 506, note, Lord Mansfield, concurring with Lord Hardwicke, denied that either by the law of England or any other law every contract made by an infant was void; that contracts for necessities, such as diet, education, etc., were good, and the infant's body is liable to be taken in execution for them; so of a sum advanced for taking an infant out of jail: that infancy could never authorize the committing a fraud, as, if goods were delivered to an infant, and he embezzled them, an action of trover would lie against him; as, if he took an estate, and was to pay rent for it, he should not defend himself against payment of the rent, and yet hold the estate upon pretence of his infancy; and relied on a case of *Watts v. Hailswell*, where the infant issue in tail, being eighteen years old, had engrossed the mortgage deed, and did not discover his right to the mortgagee. Lord Cowper held him bound, because being of

years of discretion he had acted dishonestly in not discovering his title. *Clarke v. Cobley*, 2 Cox, 173, was decided on the ground that an infant shall not take advantage of his own fraud, and was not to be allowed to retain his wife's promissory notes, which had been surrendered to him on his giving his bond for them, on his pleading infancy to a suit on the bond. In *Cory v. Gerteken*, 2 Madd. 40, too, it was held that a minor could not avail himself of his infancy as a defence against fraud. The court there said: "Though in general a payment to an infant may be bad, yet if the infant practises a fraud he is liable for the consequences. At law an infant is liable in *tort*, and cannot plead his infancy, as where [a very strong case] an action of assumpsit was brought against an infant for money embezzled by him." *Bristow v. Eastman*, 1 Esp. 172. In *Wright v. Snowe*, 2 De G. & S. 321, 324, the court said: "It is too late to deny that an infant may commit a fraud to the prejudice of his civil rights; but what amounts to such a fraud is often a delicate question." In the case at law, too, of *Bristow v. Eastman*, 1 Esp. 172, where a minor had been guilty of embezzlement, and an action of assumpsit for money had and received was brought against him, the action was sustained; Lord Kenyon saying that he was of opinion that infancy was no defence to the action; that infants were liable to actions *ex delicto*, though not *ex contractu*; and though the present action was in form an action of the latter description, yet it was of the former in point of substance; that if the plaintiffs had brought an action of trover for any part of the property embezzled, or an action grounded on the fraud, unquestionably infancy would have been no defence; and as the object of the present action was precisely the same, his opinion was that the same rule should apply, and that infancy was no bar to the action. These principles clearly are more in harmony with the doctrines established by the cases at law in this country than they are with some of the recent cases at law in England, in which latter the plea of infancy in actions *ex delicto* has been held as available as in actions *ex contractu*.

BOOK II.

PART II.

MENTAL DISABILITIES.

1. INSANITY. According to some of the highest of the old common-law authorities,¹ no man could be allowed to stultify himself, and avoid his acts, on the ground of his being *non compos mentis*.²

¹ Littleton, § 405; 1 Coke's Inst., 247*b*; Beverley's Case, 4 Rep. 123*a*.

² A great variety of tests or definitions of insanity are furnished in cases where the issue of insanity or non-insanity has been involved. Lord Brougham, in *Waring v. Waring*, 6 Moo. P. C. at p. 354, defines insanity to be "The belief of things as realities which exist only in the imagination of the patient." Sir John Nicholl, in *Dew v. Clark*, reported by Dr. Haggard at p. 7; s. c. 3 Addams, 79; says, it is "A belief of facts which no rational person would have believed." In *Smith v. Tebbitt*, L. R. 1 P. & D. 398, both of these are deemed unsatisfactory: the first on the ground that sane people often imagine things to exist which have no existence in reality, both in the physical and moral world; and the second on the ground of fixing the limit of a rational man's belief. The definition by Dr. Willis, a man of great eminence, quoted in *Dew v. Clark* (*supra*), "A pertinacious adherence to some delusive idea, in opposition to plain evidence of its falsity," seems to offer surer ground; but then the evidence of the falsity is to be plain, and in doubtful cases the want of such plainness is the very difficulty that arises. To draw the exact line, if there be one, which defines the limits, may be impossible; but to affirm that some instances surpass it, is not so. "No one," says Burke, "can say when twilight begins or ends; but there is ample distinction between day and night." In *Smith v. Tebbitt*, L. R. 1 P. & D. 398, the court concluded that no tests, however elaborate, beyond the common and ordinary method of judging in such matters, would be competent to bear the strain of individual cases in the

course of experience, in attempting to assign limits within which extravagance of thought is to be pronounced compatible with sanity. In inquiring what that common and ordinary method of judging is, and upon what it is founded, the court said: "No man knows aught of the condition of another's mind except by comparison with his own. And in instituting this comparison, we recognize the general fact that all mankind are endowed with the same senses, moved by the like emotions, governed by the same restraints, and guided by the same faculties. All these vary in their force and action in different individuals, or the same individual at different times. But they vary within certain limits, and certain limits only. It is when the words or deeds of others, referred to our own standard, and that which by experience is found to be the common standard of the human race, appear to transgress these limits, that we suspect these common senses, emotions, and faculties, which we know to exist, to be the subjects of disorder or disease. If the divergence be very marked, and exhibit itself on many subjects or with uniform constancy in the behavior of the individual, we pronounce disease without hesitation. In proportion as the divergence is either casual or trifling, or open to some other probable solution, the inquiry is difficult, and the judgment hesitates. Here, then, I think, is the simple rule by which mankind in general pronounce upon mental disease. But to those who have studied the subject of insanity, another and alternative method is open.

"There may be, and no doubt are, many whose insanity is suspected but not

But this rule, in modern times, has been relaxed, and unsoundness of mind is now a good defence, generally, to an action upon a con-

proved; but in the large majority of the insane, mental disease admits of no doubt whatever. Their ideas, their conduct and demeanor, contrast at almost every point of comparison with those of their fellow-men. And it is the especial business of those who devote themselves to the mitigation or cure of this fearful malady to study the ways, and forms of thought and expression, which attend upon it; the sort of things that the insane say and do; their bearing and demeanor; the occasions they choose or decline for the exhibition of their ruling ideas. All these become familiar to the medical attendant. Hence he is furnished with another road by which to approach the determination of insanity in a doubtful case. He can reason from the certainly to the probably diseased mind, and is enabled to trace in the latter lineaments which are clearly marked in the former. Thus while the world at large can only contrast the doubtful case with the sane, the physician has at hand the alternative contrast with the insane. It is a consequence of these alternative methods of judgment that the question of insanity, though it falls to the lot of a legal tribunal, is properly a mixed one,—partly within the range of common observation, and in so far fit to be considered by a jury; partly within the range of special experience, and in so far the proper subject of medical inquiry. It is the office of the court, then, to inform itself, as far as opportunity permits, of the general results of medical observation, and to approach the subject of the case on the two opposite sides thus indicated,—searching for a fit conclusion by alternately presenting the parallel of sanity and insanity to the sayings and doings of the deceased." *Per* Sir J. P. Wilde, in delivering the judgment in *Smith v. Tebbitt*, L. R. 1 P. & D. 398, 403, *et seq.* And see *Waring v. Waring*, 6 Moo. P. C. 341; *Thornton v. Howe*, 31 Beav. 14; *Symes v. Green*, 1 Sw. & Tr. 401; *Nottidge v. Prince*, 2 Giff. 246; *Wood's Case*, 27 State Trials, at p. 1315; *Prinsep v. Dyce Sombre*, 10 Moo. P. C. 232; *Dew v. Clark*, 3 Addams, 79. Sir John Nicholl, in *Dew v. Clark* (*supra*), says: "The true criterion—the true test—of the absence or presence of insanity, I take to be the absence or presence of what, used in a certain sense of it, is comprisable in a single term,—*delusion*. Whenever the patient once conceives something extravagant to exist, which has still no existence whatever but in his own heated imagination, and whenever, at the

same time, having once so conceived, he is incapable of being, or, at least, of being permanently, reasoned out of that conception, such a patient is said to be under a delusion in a peculiar, half-technical sense of the term; and the absence or presence of delusion, so understood, forms, in my judgment, the true and only test or criterion of absent or present insanity." See also *Cartwright v. Cartwright*, 1 Phill. Ec. R. 90; *Ansten v. Graham*, 8 Moo. P. C. 493; *Mudway v. Croft*, 3 Curt. 675; *The Queen v. Hill*, 2 Den. C. C. 234; *McAdam v. Walker*, 1 Dow, 178.

The question as to what is lunacy came up before Hudson, J., in *Robertson v. Lyon*, 24 S. C. 266, in an action to vacate a finding of lunacy, when the court said: "In this present inquiry lunacy is a term of general import, embracing every kind of insanity or unsoundness of mind that incapacitates a person to attend to the ordinary business of life. It is not a mere weakness of mind, nor a want of good business talent, nor is it thoughtlessness and improvidence in business. Men of sound mind are frequently spendthrifts. Such have the full right to use, enjoy, waste, and destroy their property, and it is nobody's business nor right to interfere. Some men waste their all in gambling and dissipation, but cannot be pronounced insane in the proper sense of the word. That unsoundness of mind, that lunacy, which we are inquiring after in this issue, is such an unsoundness of mind as is evidenced by a total absence of sufficient mental capacity to attend to the ordinary business of life. When one is entirely incapable of caring for, controlling, and managing his own person and property, he is, in the eye of the law, a lunatic, requiring a guardian. This may arise from various causes, and among them from old age, when it is termed *senilis dementia*. It happens when the body outlives the mind. . . . A *non compos mentis*—a lunatic—is a person who is so far deprived, from any cause, of intelligence and sense as to be incapable of caring for and managing his person and property, and who for that purpose absolutely requires a guardian." In *Fitzgerald v. Shelton*, 95 N. C., with reference to the evidence to prove insanity, the court said: "A very great variety of facts oftentimes make evidence tending to prove the insanity of a person alleged to be insane. If his general course of conduct, his methods of business, his particular business transactions, his conversation, his declarations made from time to time, his ordinary speech, his speech and actions on

tract, if it can be shown that the defendant was not of capacity to contract, and the plaintiff knew it.¹ But when a person, apparently

particular occasions, his habits, are very eccentric, foolish, unnatural, absurd, and shocking to reasonable people, what he so says and does is evidence to prove that he is insane. Such evidence would be stronger or weaker in proportion to the degree of absurdity, unreasonableness, and unnaturalness of what such person so did and said. It might be very strong; it might be so very slight as not to be sufficient to go to the jury at all. Merely immoral, vicious, and criminal acts would not of themselves be evidence of insanity; but they might be, in connection with other facts. In an inquiry in such respect, it becomes necessary and pertinent to scrutinize the transactions, declarations, and conduct of the party whose sanity is in question, with a view to ascertain whether or not the same are indeed absurd, unreasonable, and unnatural. It is not every act that seems to be thus that is so in fact. It frequently turns out that what so appears is just the reverse, and tends to prove the intelligence and wisdom of the person doing the act in question. Hence explanatory evidence as to the reasonableness, naturalness, justice, and wisdom of the particular acts or transactions relied upon as evidence of insanity, is competent." And see *Barbo v. Rider*, 67 Wis. 598; *In re Will of Chapin*, 32 Wis. 557; *In re Will of Cole*, 49 Wis. 179; *Wright v. Jackson*, 59 Wis. 584; *Perrine's Case*, 41 N. J. Eq. 409; *Brower v. Fisher*, 4 Johns. Ch. 441; *In re Barker*, 2 Johns. Ch. 232; *Dickenson v. Blisset*, 1 Dick. 268; *Gibson v. Jeyes*, 6 Ves. 267, 273; *Ridgway v. Darwin*, 8 Ves. 65; *Ex parte Cranmer*, 12 Ves. 445; *Riggs v. American Home Missionary Society*, 35 Hun, 656; *Jackson v. Jackson*, 37 Hun, 306; *English v. Porter*, 109 Ill. 285; *Doty v. Hubbard*, 55 Vt. 278; *Pavey v. Winthrope*, 87 Ind. 379; *Wolff v. Connecticut Mutual Life Ins. Co.*, 2 Flip. C. Ct. 355; *Re Helmbold*, 12 Phila. 424. Although the mind of an individual may be to some extent impaired by age or disease, still if he be capable of transacting his ordinary business his acts will be valid. *English v. Porter*, 109 Ill. 285, 291; *Meeker v. Meeker*, 75 Ill. 266; *Trish v. Newell*, 62 Ill. 196; *Pickrell v. Morss*, 97 Ill. 220; *Lindsey v. Lindsey*, 50 Ill. 79. When lunacy is once established, the burden is on the party claiming, through any act of the lunatic, to show that it was done in a lucid interval. *Wright v. Jackson*, 59 Wis. 569, 576; *Ripley v. Babcock*, 13 Wis. 425. The adjudication of insanity fixes the legal status of the party as to his in-

capacity to make contracts. *Redden v. Baker*, 86 Ind. 194; *L'Amoureux v. Crosby*, 2 Paige, 422; *Wadsworth v. Sharpsteen*, 8 N. Y. 388; *Wadsworth v. Sherman*, 14 Barb. 169; *Fitzhugh v. Wilcox*, 12 Barb. 235; *Leonard v. Leonard*, 14 Pick. 280; *Imhoff v. Witmer's Admrs.*, 31 Pa. St. 243.

¹ *Dane v. Viscountess Kirkwall*, 8 C. & P. 679; *Gore v. Gibson*, 6 M. & W. 623; *Mitchell v. Kingman*, 5 Pick. 431; *Rice v. Peet*, 13 Johns. 543; *Grant v. Thompson*, 4 Conn. 103; *Seaver v. Phelps*, 11 Pick. 304; *Barsell v. Chancellor*, 5 Whart. 374; *Yates v. Boen*, 2 Str. 1104; *Cole v. Robins*, Bull. N. P. 172; *Cooke v. Clayworth*, 18 Ves. 12; *Baxter v. Earl of Portsmouth*, 5 B. & C. 170; *Browne v. Joddrell, M. & Malk*. 105.

In *Browne v. Joddrell, M. & Malk*. 105, in an action of assumpsit, the defence relied on was unsoundness of mind; but it was not claimed that the plaintiff was aware of the defendant's malady, or had in any way been guilty of fraud. Lord Tenterden was willing to receive the evidence offered, but held that the defence would not avail unless it were shown that the plaintiff imposed on the defendant. Lord Tenterden said: "The old cases go the length of saying that a party shall in no case be allowed to set up his own insanity. That, I think, is too general a rule. If you can show that any means were used to impose upon a person of weak or unsound mind, I think that in this, as in all other cases of fraud, it is an answer." And in *Levy v. Baker, M. & Malk*. 106, note *b*, which was also an action of assumpsit, it was proved that at the time of the transactions the defendant was manifestly insane, and evidence was given of fraudulent advantage taken by the plaintiff. Best, C. J., after argument on the admissibility of the defence, left it to the jury to say whether the plaintiff, at the time he dealt with the defendant, knew of his insanity. If he did, it was a gross fraud, and the jury ought to find for the defendant, which they did. Where R. was at the time of executing a mortgage notoriously insane, and was, to the knowledge of the mortgagee, in a state of imbecility, the mortgage was annulled, although at the time of making the mortgage R. had not been interdicted. *Feeel Admr. v. Guinault*, 32 La. Ann. 91. And where a contract is set aside because one of the parties to it is notoriously insane at the time of making it, the doctrine of *restitutio ad integrum* will only be applied to the extent that the insane

of sound mind, and not known to be otherwise, enters into a contract for the purchase of property which is fair and *bonâ fide*, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties *in statu quo*, the contract cannot afterwards be set aside, either by the alleged lunatic or those who represent him.¹

person has derived benefit from the consideration received for his contract. *Legacy v. Marston*, 32 La. Ann. 170. In *Anglo-Californian Bank v. Ames*, 27 Fed. Rep. 727, it was held that the negotiable paper obtained from an insane person by fraud and deception, and without consideration, could not be collected by an innocent purchaser without notice. See also *Dexter v. Hall*, 15 Wall. 20; *Wirebach v. First Nat. Bank*, 97 Pa. 43; *Moore v. Hershey*, 9 Norris, 196; *McClain v. Davis*, 77 Ind. 419; *Burke v. Allen*, 29 N. H. 106; *Marvin v. Inglis*, 39 How. (N. Y.) 329. On the question of knowledge of insanity, the general rule is that absence of knowledge of the insanity of the party, as well as fairness in other respects, must concur to give validity to a contract with a lunatic. Knowledge or information such as would lead a prudent person to the belief of the incapacity, is such evidence of bad faith as will avoid the contract. *Matthiessen & Weichers Refrig. Co. v. McMahon's Admr.*, 33 N. J. L. 536; *Lincoln v. Buckmaster*, 32 Vt. 652. See *Price v. Berrington*, 7 Hare, 402; *Elliott v. Ince*, 7 De G. M. & G. 475; *Yanger v. Skinner*, 1 McCart. 389; *Eaton v. Eaton*, 8 Vroom, 108; *Matthews v. Baxter*, L. R. 8 Ex. 132. And where one who had no capacity to make contracts or transact business, and his want of such capacity was apparent to any person of ordinary prudence and observation who might converse with him, exchanged horses with the defendant, it was held that the guardian of the insane man could recover back the horse given by his ward to the defendant, without being compelled to restore the defendant's horse. *Halley v. Twester*, 72 Mo. 73. See *Tolson v. Garner*, 15 Mo. 494; *Farley v. Parker*, 6 Oregon, 105; *Dexter v. Hall*, 15 Wall. 20; *Henry v. Fine*, 23 Ark. 417; *Lancaster Co. Bank v. Moore*, 78 Pa. 407; *Rusk v. Fenton*, 14 Bush, 490; *Betts v. Carroll*, 6 Mo. App. 518.

¹ *Molton v. Canroux*, 2 Ex. 487, 18 L. J. Ex. 68, affirmed in error, 4 Ex. 17, 18 L. J. Ex. 356. And see *Howard v. The Earl of Digby*, 2 Cl. & Fin. 634; *Williams v. Wentworth*, 5 Beav. 325; *Selby v. Jackson*, 6 Beav. 192; *Niell v. Morley*, 9 Ves. 478; *Browne v. Joddrell*, 3 C. & P.

30, *per Lord Tenterden*; *Beals v. See*, 10 Barr, 56; *La Rue v. Gilkyson*, 4 Barr, 375; *Beaven v. McDonnell*, 9 Ex. 309; *Elliott v. Ince*, 7 De G. M. & G. 475.

Courts of equity have long recognized the principle that the contract of a person not having sufficient mental capacity to enter into such contract, although not wholly *non compos*, may be avoided under certain circumstances, provided it can be done without injustice to the opposite contracting party. But when the party contracting with the lunatic acted in good faith, without knowledge of, or reason to suspect, his mental incapacity, and the party cannot be put *in statu quo*, a court of equity will not interfere to set aside the contract. *Riggs v. American Tract Society*, 26 Hun (N. Y.), 481, 488; *Loomis v. Spencer*, 2 Paige, 158; *Price v. Barrington*, 15 Jur. 999; 3 Mac. & G. 486; *Sprague v. Duel*, 11 Paige, 480; *Neil v. Morley*, 9 Ves. 478; *Person v. Warren*, 14 Barb. 488; *Dane v. Kirkwall*, 8 C. & P. 679; *Tarback v. Bispham*, 2 M. & W. 6. Where a person has been permitted to act entirely at his own discretion, and to do all the acts which the most sane man is intrusted to execute, and this course has been going on with the knowledge of all his family who had any interest in, or feeling about, the management of his affairs, the officer to whom the jurisdiction in lunacy is confided will be very cautious before he establishes, on the petition of those parties, a commission which is sought to have a retrospective operation, and to affect transactions which took place whilst the alleged lunatic was allowed to act as if he were sane, and to deal with a variety of persons who, without any unfairness on their part, would be involved in the consequences of establishing such a commission. *Ec parte Hall*, 7 Ves. 264. The case of *Molton v. Canroux*, 2 Ex. 487, 4 Ex. 17, was decided on the principle that an executed contract, when the parties have been dealing fairly, and in ignorance of the lunacy of the party with whom they were contracting, should not afterwards be set aside. This decision, as we state in the text, was approved in *Elliott v. Ince*, 7 De G. M. & G. 475, as one of necessity, and it was declared that a

And, therefore, in a case where a lunatic purchased annuities for his life of a society which, at the time, had no knowledge of his unsoundness of mind, the transaction being in the ordinary course of human affairs, and fair and *bonâ fide* on the part of the society, it was held that, after the death of the lunatic, his personal representatives could not recover from the society the premiums paid for the annuities.¹ And in another case, the plaintiff contracted to purchase an estate from the defendant, and paid a deposit on the terms that unless he objected to the title within a certain time, the same should be considered as accepted. No objection was made by him to the title. The plaintiff at the time of the contract, and of the payment of the deposit, was a lunatic incapable of understanding the meaning of a contract or of managing his affairs, and derived no benefit from the contract, but these facts were unknown to the defendant, who made the contract with him fairly and *bonâ fide*, believing him capable of understanding the same. It was held, that as the contract was entered into by the defendant, and the money received fairly and in good faith and without knowledge of the lunacy, and, so far as concerned the deposit, the transaction was completely executed, the plaintiff was not entitled to a return of the money so deposited.²

contrary doctrine would render all ordinary dealings between man and man unsafe. The same doctrine has been acted on in many other cases. *In re Beckwith*, 3 Hun, 443; *Canfield v. Fairbanks*, 63 Barb. 461; *Lancaster County Bank v. Moore*, 78 Pa. 407; *Wielder v. Weakley*, 34 Ind. 181; *Matthiessen v. McMahon*, 38 N. J. L. 536; *Behrens v. McKenzie*, 23 Iowa, 333; *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541; *Shoulders v. Allen*, 51 Mich. 529; *Nace v. Boyer*, 30 Pa. 99; *Henderson v. McGregor*, 30 Wis. 78; *Young v. Stevens*, 48 N. H. 133; *Baldrick v. Garvey*, 66 Iowa, 14; *Scanlan v. Cobb*, 85 Ill. 296. In this last-cited case it is said that the English doctrine, and that generally recognized by the courts in this country, is, where a purchase from an insane person is made and a conveyance obtained in good faith for a sufficient consideration, and without knowledge of the insanity, the consideration must be returned before the conveyance will be avoided. And the courts have gone further, and held, that where persons apparently of sound mind, and not known by the adverse party to be otherwise, enter into a contract which is fair and *bonâ fide*, and which is executed and completed, and the property which is the subject of the contract cannot be restored so as to put the parties *in statu quo*, such contracts cannot be set aside either by the alleged lunatic or those who repre-

sent him. *Eaton v. Eaton*, 8 Vroom, 108; *Niell v. Morley*, 9 Ves. 478; *Molton v. Camroux*, 2 Ex. 487; *Carr v. Holiday*, 5 Ired. Eq. 167; *Sprague v. Duell*, 11 Paige, 480; *Lavere v. Gilkyson*, 4 Barr, 375; *Beale v. Lee*, 10 Barr, 56; *McCormick v. Littler*, 85 Ill. 62. But though equity in some cases will protect persons dealing in good faith, and without knowledge, with lunatics who appear to be rational; yet in no case will a contract with such a person be upheld as between themselves when the transaction is without any consideration. In such a case, as the insane person has received no benefit, and the other party suffered no loss, no equity can arise in favor of the other party. *Hull v. South*, 109 Ind. 315; *Manning v. Gill*, L. R. 13 Eq. 485. See, further, *Gribben v. Maxwell*, 34 Kan. 8; *Lozeau v. Shields*, 23 N. J. Eq. 509; *Darren v. White*, 42 N. J. Eq. 569; *Surles v. Pipkin*, 69 N. C. 513; *Sawyer v. Lufkin*, 56 Me. 308; *Van Horn v. Hann*, 39 N. J. L. 207. Where a guardian carries on the business of an insane person, parties dealing with the guardian only as such cannot hold the guardian personally liable for debts contracted in carrying on the business of the insane person. *Western Cement Co. v. Jones*, 8 Mo. App. 373.

¹ *Molton v. Camroux*, *supra*.

² *Beaven v. McDonnell*, 9 Ex. 309; 23 L. J. Ex. 94. The same doctrine, in

The rule, both of law and of equity, as to a contract entered into by a person apparently of sound mind, and not known by the other contracting party to be insane, is, that such a contract, if fair, *bonâ fide*, and completely executed, is valid; and even in cases where the contract may possibly be void at law, courts of equity will not interfere to set it aside, except in the case of fraud. To vitiate a contract, the knowledge of the lunacy or incapacity must be not merely actual, but presumably sufficient, from circumstances known to the other contracting party,¹ to lead him to a reasonable conclusion that the person with whom he is dealing is of unsound mind.²

Lord Cranworth, in *Elliott v. Ince*,³ put the reason of the rule thus: "The principle in *Molton v. Camroux*⁴ was that executed contracts, where the parties had been dealing fairly, and in ignorance of the lunacy, should not be set aside. This was a decision which might be described as a decision of necessity. A contrary decision would render all dealings unsafe. How was a shop-keeper who sold his goods, to know whether the customer was of unsound mind? . . . The result of the authorities appeared to be that dealings by way of sale and purchase by a person apparently sane, but afterwards found to be insane, would not be set aside as against those who had dealt with him on the faith of his being a person of competent understanding."

But it has been generally held in this country, not only that

effect, is held in *Campbell v. Hooper*, 3 Sm. & G. 153; 24 L. J. Ch. 644; *Dane v. Viscountess Kirkwall*, 8 C. & P. 679; *Elliott v. Ince*, 7 De G. M. & G. 475; 26 L. J. Ch. 821.

¹ Evidence of the general reputation of the insanity of a person in the neighborhood in which he resides is inadmissible to prove that a person was cognizant of that fact. *Greenslade v. Dare*, 20 Beav. 284; 24 L. J. Ch. 490. See further as to evidence of insanity, *Hume v. Burton*, 1 Ridgw. P. C. 211; *Clark v. Periam*, 2 Atk. 340; 9 Mod. 346; *Blatchford v. Christian*, 1 Knapp, 73; 1 Hale, P. C. 29, 30; *Rochfort v. Ely*, 1 Ridgw. P. C. 532; *Barnesly's Case*, 2 Eq. Abr. 580. The rules of judging in equity and at law in cases of insanity are the same. *Bennett v. Vade*, 2 Atk. 327; 9 Mod. 312.

² *Hassard v. Smith*, 6 Ir. R. Eq. 429. The court quotes approvingly, in this case, from Story's Eq. Jur., §§ 227, 228, the rule there laid down, thus: "The ground upon which courts of equity now interfere to set aside the contracts and other acts, however solemn, of persons who are idiots, lunatics, and otherwise *non com-*

potes mentis, is fraud. And so, if a purchase is made in good faith, without any knowledge of the incapacity, and no advantage has been taken, courts of equity will not interfere to set aside the contract, if injustice will be thereby done to the other side, and the parties cannot be placed *in statu quo*, or in the state in which they were before the purchase." In *Niell v. Morley*, 9 Ves. 482, Sir William Grant refused to interfere, and left the party seeking to invalidate an executed contract, entered into *bonâ fide* and without knowledge of the plaintiff's insanity, to his remedy, if any, at law. And in *Price v. Berrington*, 3 McN. & G. 496, Lord Truro acted upon the same principle, and dismissed a bill to set aside a conveyance, although the jury, on an issue directed by Lord Langdale, had found that the grantor was not of sound mind when he executed it, he having been already found a lunatic, by inquisition, from a date anterior to the conveyance, and without lucid intervals.

³ 7 De G. M. & G. 475; 26 L. J. Ch. 821.

⁴ 2 Ex. 487, affirmed 4 Ex. 17.

executory contracts made by a lunatic cannot be enforced,¹ but that executed contracts not made for necessities can be rescinded.² And where the consideration is very inadequate, a court of equity or an impartial jury will closely scrutinize the facts, and will give weight to slight evidence of imposition and circumvention when one of the parties is of weak intellect;³ and to set aside promissory notes on the ground of mental incapacity, it is not necessary to prove partial derangement. It is sufficient if there appears such weakness of mind as to incapacitate the party to guard himself against imposition and undue influence.⁴ But a want of absolute and perfect soundness of mind does not necessarily affect the capacity to make a valid contract, provided the mind is still capable of fully comprehending the import of the act.⁵

And the cases in the United States Supreme Court establish the proposition that extreme weakness of intellect, even when not amounting to insanity, in the person executing a conveyance, may be sufficient ground for setting it aside when made upon a nominal or grossly inadequate consideration.⁶ But, like the contract of an infant, that of a lunatic is voidable and not void.⁷

In both countries, however, the law is the same, that a lunatic may contract for necessities suitable to his degree, and that an action will lie against him for necessities suitable to his degree, notwithstanding an inquisition of lunacy, and notwithstanding the party supplying the necessities to his order had notice of his incapacity in any other way.⁸

¹ *Grant v. Thompson*, 4 Conn. 203; *Long v. Whidden*, 2 N. H. 435; *Mitchell v. Kingman*, 3 Pick. 431.

² *Sewer v. Phelps*, 11 Pick. 304; *Fitzgerald v. Reed*, 9 Sm. & M. 94; *Johnson v. Chadwell*, 8 Humph. 145; *Beller v. Jones*, 22 Ark. 92. And see further, *Henry v. Fine*, 23 Ark. 417; *Menkens v. Lightner*, 18 Ill. 282; *Taylor v. Dudley*, 5 Dana (Ky.), 308; *Bond v. Bond*, 7 Allen, 1.

³ *McFadden v. Vincent*, 21 Tex. 47; *Hale v. Brown*, 11 Ala. 87; *James v. Langdon*, 7 B. Mon. 193; *Wilson v. Oldham*, 12 Ib. 55.

⁴ *Johnson v. Chadwell*, 8 Humph. 145; *Beller v. Jones*, 22 Ark. 92.

⁵ *Hovey v. Hobson*, 55 Me. 256; *Miller v. Craig*, 36 Ill. 109; *Speers v. Sewell*, 4 Bush (Ky.), 239; *Hovey v. Chase*, 52 Me. 304; *Dennett v. Dennett*, 44 N. H. 531; *Odell v. Buck*, 21 Wend. 142; *Osterhout v. Shoemaker*, 3 Den. 37; *Davis v. Culver*, 13 How. Pr. R. 62; *Rippy v. Gaunt*, 4 Ired. Eq. 443. But see *Samuel v. Marshall*, 3 Leigh, 567; *Smith v. Elliott*, 1 Patt. & H. (Va.) 307.

⁶ *Harding v. Handy*, 11 Wheat. 103; *Allore v. Jewell*, 94 U. S. 506; *Conley v. Nailor*, 118 U. S. 127.

⁷ *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236; *Somers v. Pumphrey*, 24 Ind. 231; *Cates v. Woodson*, 2 Dana, 452; *Allis v. Billings*, 6 Mete. 415; *Hovey v. Hobson*, 53 Me. 451; *Arnold v. Richmond Iron Works*, 1 Gray, 434.

⁸ *Baxter v. Earl of Portsmouth*, 7 D. & R. 614; 5 B. & C. 170; *Stedman v. Hart*, 1 Kay, 607; 23 L. J. Ch. 908; *Manby v. Scott*, 1 Sid. 112; *Wentworth v. Tubb*, 1 Y. & C. 171; *Howard v. Lord Digby*, 2 Cl. & F. 634; *Richardson v. Strong*, 13 Ired. Law, 106; *Ex parte Nottingham*, 1 Ala. Sel. Cas. 400; *Pearl v. McDowell*, 3 J. J. Marsh. 658; *Skidmore v. Romaine*, 2 Bradf. 122. See *Fitzgerald v. Reed*, 17 Miss. 94; *Crowther v. Rowlandson*, 27 Cal. 376; *Maddox v. Simmens*, 31 Ga. 512. In the case of *Williams v. Wentworth*, 5 Beav. 325, it was claimed, with reference to costs incurred on a commission of lunacy, and which were held to have been properly incurred for the benefit of the

So an insane husband is liable for necessities supplied to his wife during the period of his lunacy.¹ This is put on the ground that as a woman has the power to bind her husband for necessities which she is compelled by his misconduct to procure, if the husband becomes lunatic by the visitation of God, and therefore unable to provide his wife with necessities, he becomes as liable to pay for them as though his failure to provide them was the result of his own fault or misconduct.²

In a case where the plaintiff was a tradesman, and the defendant had given his wife authority to deal with the plaintiff, and had held her out as his agent and as entitled to pledge his credit, the defendant subsequently became insane, and while his malady lasted, his wife ordered goods from the plaintiff, who accordingly supplied them. At the time of supplying the goods, the plaintiff was unaware that the defendant had become insane. The defendant, on recovering his reason, having refused to pay for the goods, it was held that he was liable for the price of them.³

lunatic, and were necessary for the protection of his person and estate, that however beneficial to the lunatic the expenditure might have been, yet, as the lunatic was incapable of contracting, no debt could be constituted; but the court held that, in the case of money expended for the necessary protection of the person and estate of the lunatic, the law would raise an implied contract, and give a valid demand or debt against the lunatic or his estate; that under such circumstances a debt was constituted, and payment of it might be obtained out of the lunatic's real estate if the personal estate were insufficient. Lord Langdale, in delivering the judgment, said: "Any other conclusion would, as it appears to me, be extremely dangerous, as well as contrary to the principles upon which several cases have been decided. That which is necessary for the protection of the person and estate of the lunatic may well be subject to question and consideration; but when a demand is made in respect of a necessary of that kind, I do not see how it is to be distinguished, in principle, from a demand arising in respect of the supply of food and clothing. A debt is constituted by reason of a contract, which, in such cases, the law will supply, and it rests, as I conceive, upon a far better foundation than the rule which has sometimes been referred to, — that a man shall not be allowed to stultify himself." *Williams v. Wentworth*, 5 Beav. 325. This furnishes an answer to the position sometimes taken (see 1 Pars. on Con. 435, note *d*), which we think entirely unsound, applicable as

it would also be to the undoubtedly legal "contracts" of a lunatic for necessities, that, in such cases, "there never was a contract between the parties," because the "person in a state of intoxication" [or the lunatic] "has no agreeing mind." This is one of the cases where the law implies a contract, as an agency is implied in the cases considered *post*, Parts III. and IV., of a married woman and a ship-master being agents of necessity, from the very necessity of the case. See *Light v. Light*, 25 Beav. 248, where a suit was allowed to be brought by a person of weak mind by his next friend. And see further, *Brown v. Joddrell*, 3 C. & P. 30; *Dane v. Lady Kirkwall*, 8 C. & P. 679; *The Earl of Bath v. The Earl of Bradford*, 2 Ves. Sen. 587; *Wentworth v. Tubb*, 1 Y. & C. 171; *Nelson v. Duncombe*, 9 Beav. 211.

¹ *Reed v. Legard*, 6 Ex. 637; 20 L. J. Ex. 309.

² See, also, *Alexander v. Miller*, 4 Harris, 213. Although one who has been a lunatic may, either by special plea or under the general issue, avoid his express contracts, yet upon contracts implied in law, as for necessities for his wife, his liabilities continue. *Pearl v. McDowell*, 3 J. J. Marsh. 658.

³ *Drew v. Nunn*, 4 Q. B. Div. 661. In *In re Wood*, 1 De G. J. & S. 465, proof was allowed in equity against the estate of a testator for money advanced to his wife during his lunacy, and applied by her in payment of her necessary expenses, though she had a separate income.

But where in an action for the price of necessary repairs done to the defendant's house, it appeared that he was a lunatic, and that the work was done by order of his wife, with knowledge on the part of the plaintiff of the husband's lunacy, the wife having always received a sufficient allowance from her husband's estate, it was held that the husband was not liable, as under the circumstances the wife had no more authority to pledge his credit than she would have had if he had been sane, and had provided her with means for all necessaries.¹

Acts done by a lunatic during lucid intervals are valid, but, general lunacy being established, the proof is thrown upon the party alleging a lucid interval, and he must establish, beyond a mere cessation of violent symptoms, a restoration of mind sufficient to enable the party soundly to judge of the act.²

¹ Richardson v. Du Bois, L. R. 5 Q. B. 51.

² Hall v. Warren, 9 Ves. 605, 610; Attorney-General v. Parnter, 3 Bro. C. C. 441; Hassard v. Smith, 6 Ir. R. Eq. 429. If a man has been insane and afterwards recovers his reason, it is not sufficient, in order to impeach an act done by him after his recovery, to show that he was not as sound a man in his judgments as before his insanity. All that the law requires is that a man should have possession of his reason so as to know the effect of the act he is about to perform, and to be capable of carrying that act into effect. Creagh v. Blood, 2 J. & L. 509; 8 Ir. R. Eq. 434. See, also, *Re J. B.*, 1 Myl. & C. 538, as to distinction between lunacy with lucid intervals, and a state of sound mind subject to occasional unsoundness, arising from accidental and temporary causes; and Harrod v. Harrod, 1 Kay & J. 4; 18 Jur. 853, as to distinction between unsoundness of mind and mere dulness of intellect. See, further, as to insane delusions, Creagh v. Blood, *supra*; *Re Dyce Sombre*, 1 Maen. & G. 116; 13 Jur. 857; Ditchburn v. Fearn, 6 Jur. 201; Bannatyne v. Bannatyne, 2 Rob. Ec. R. 472; 16 Jur. 864. The mere existence of a delusion in the mind of a person making a disposition or contract is not sufficient to avoid it, even though the delusion is connected with the subject-matter of such disposition or contract. It is a question for the jury whether the delusion affected the disposition or contract. Jenkins v. Morris, L. R. 14 Ch. D. 674. See, also, Waring v. Waring, 6 Moo. P. C. 341; Smith v. Tebbitts, L. R. 1 P. & D. 398; Banks v. Goodfellow, L. R. 5 Q. B. 549; Boughton v. Knight, L. R. 3 P. & D. 64; Snee v. Snee, 49 L. J. P. & M. 8. Weakness of mind and forgetfulness are not sufficient to invalidate a will or con-

tract, if it is proved that the mind of the testator or contractor was, when called to exertion, capable of attention and application. Tufnell v. Constable, 3 Knapp, 122; Osmond v. Fitzroy, 1 P. Wms. 130.

In Smith v. Tebbitts, L. R. 1 P. & D. 398, it was held that a diseased state of mind once proved to have established itself will be presumed to continue, and the burthen of showing that health has been restored falls upon those who assert it. In *The Attorney-General v. Parnter*, 3 Bro. C. C. 442, Lord Thurlow said: "If derangement be alleged, it is clearly incumbent on the party alleging it to prove such derangement. If such derangement be proved, or be admitted to have existed at any particular period, but if a lucid interval be alleged to have prevailed at the period particularly referred to, then the burthen of proof attaches to the party alleging such lucid interval, who must show sanity and competence at the period when the act was done, and to which the lucid interval refers; and it certainly is of equal importance that the evidence in support of the allegation of a lucid interval, after derangement at any period has been established, should be as strong and as demonstrative of such fact as where the object of the proof is to establish derangement." Although this, not stated with exact fairness, is disapproved by Lord Eldon, in *Ex parte Holland*, 11 Ves. 10, it was approved and followed in *Prinsep v. Dyce Sombre*, 10 Moo. P. C. 232, where it was held that the presumption of law is, that the verdict of a jury under a commission of lunacy that the party, the subject of the commission, is of unsound mind, is well founded, and if the commission remained unsuperseded, that the party continued to be a lunatic during his life. Such presumption, however, may be rebutted and displaced by positive proof of

2. IDIOCY. The law relating to idiots and lunatics is very much the same. An idiot is defined by Lord Coke as one *non compos* from his nativity.¹ Bacon adds to Coke's definition, that he is "one who never has any lucid intervals."²

entire recovery, or possession of a lucid interval, when an act was performed. The *onus probandi*, though, lies upon the party claiming under such act, done during the subsistence of a commission of lunacy, to establish the affirmation of complete or partial recovery of the lunatic at the time of the performance of the act. And it has been held that if the mind is unsound on one subject, provided that unsoundness is at all times existing upon that subject, it is erroneous to suppose such a mind is really sound on other subjects. It is only sound in appearance, for if the subject of the delusion be presented to it the unsoundness would be manifested by such a person believing in the suggestions of fancy, as if they were realities. Any act, therefore, done by such a person, however rational that act may appear to be, is open to attack as the act of a morbid, unsound mind. And to constitute a lucid interval in such case, the party must freely and voluntarily, and without any design at the time of pretending sanity and freedom from delusion, confess his delusion. *Waring v. Waring*, 6 Moo. P. C. 341. See *Ellars v. Mossbenger*, 9 Ill. App. 122. As in the case of infancy, the defence of disability to contract cannot be raised by the other party to the contract. Thus, in *Allen v. Berryhill*, 27 Iowa, 534, it was held that where a person of unsound mind makes a contract which is beneficial to him, the law supplies or presumes the existence of the requisite capacity, or, for his protection, estops the other party from setting up and sustaining the insanity.

¹ Co. Litt. 247; 4 Co. R. 124. See 1 Hale's Hist. P. C. 30 to 37.

² Bacon Ab. tit. *Idiots and Lunatics*, A. 1, 3. Bacon here says: "Though this subject of madness may be spun out to greater length, and branched into several kinds and degrees, yet it appears that the prevailing distinction herein, in law, is between idiocy and lunacy; the first, a *fatuus a natiuitate, vel dementia naturalis*, which excuseth the party as to his acts, and entitles the king to the receipt of the rents and profits of his estate during his life, without being obliged to render any account for the same: the other, accidental or adventitious madness, which, whether permanent and fixed, or with lucid intervals, goes under the name of lunacy, and equally excuseth with idiocy, as to acts done during the phrensy. 4 Co. 125 a. But herein they differ, that in the latter

case the king, as hath been said, is only a trustee for the lunatic, and accountable to him, if he happens to be restored to his understanding, or to his representatives, if it happens otherwise." The most material difference is that as an idiot has no lucid interval, therefore the law applicable to lucid intervals of lunatics is inapplicable to idiots. The word "idiot" is a technical one well known in our ancient law, and confined to the precise case of a person "*fatuus a natiuitate*." The words of the statute 17 Ed. 2, c. 9, are "*Rex habebit custodiam terrarum futurorum naturalium*," whereby, says Cowell's Interpreter, it appears, an idiot must be "*fatuus a natiuitate*." For if he was ever wise, or became a fool by chance, etc., the king shall not have the custody of him." There are, however, some forms of writs directing inquiries, "*an idiota et fatuus natiuitate extitit*." In Lord Donegal's Case, 2 Ves. Sen. 407, Lord Hardwicke said an idiot was such as was so *ex natiuitate* (1 Will. 702); and, therefore, the court at common law held that, finding a man idiot for so many years past was good; for finding him idiot was including that he was such from his nativity, and the rest was mere surplusage. But there has been an alteration since Lord Hardwicke's time, and commissions in the nature of those of lunacy are now applied to cases where there is such an imbecility of mind as renders a person incompetent in the management of his affairs, or liable to be imposed on. See *Ridgway v. Darwin*, 8 Ves. 65, 66; *Ex parte Cranmer*, 12 Ves. 445, 447; *Eyre v. Wake*, 4 Ves. 798, note; *Gibson v. Jeyes*, 6 Ves. 266, 273. See, for further cases relating to idiocy, — In the matter of *Barker*, 2 Johns. Ch. 235; *Prodgers v. Frazier*, 3 Mod. 43; 2 Ch. Cas. 70; *Saunderson v. Saunderson*, 19 Ves. 286; *Bird v. Lefevre*, 4 Br. 100; *Ex parte Tomlinson*, 1 Ves. & B. 58; *Ex parte Atkinson*, Jacob's R. 235; *Hume v. The Earl Ely*, 7 Br. P. C. 319; *Rochfort v. Hume*, 6 Br. P. C. 329; Co. Lit. 246 b; *Beverley's Case*, 4 Co. 123; *Ex parte Barnsley*, 3 Atk. 168; *Wendell's Case*, 1 Johns. Ch. 600; *Brasher's Ex's v. Cortlandt*, 2 Johns. Ch. 233.

Formerly, one born deaf and dumb was considered, in presumption of law, an idiot. 1 Hale P. C. 34. But where, from education, they manifest fair understanding, as under instruction in deaf and dumb institutions they now do, there is no longer such presumption, and they are ordi-

3. DRUNKENNESS. Coke classifies drunkards with lunatics and idiots, as those who are *non compos*. His fourth class is: "One that is drunk; which last is so far from coming within the protection of the law, that his drunkenness is an aggravation of whatever he does amiss."¹ Coke's remark is generally true as to the criminal acts of a drunkard, but where a party, when he enters into a contract, is in such a state of drunkenness as not to know what he is doing, and particularly when it appears that this was known to the other party, the drunken man cannot be compelled to perform the contract.² A person who takes an obligation from another under such circumstances is guilty of actual fraud. The modern decisions have qualified the old doctrine, that a man shall not be allowed to allege his own lunacy or intoxication;³ and total drunkenness is now held to be a defence.⁴

narly as responsible for their acts, and as able to make binding contracts in good faith as those who have not been *surdus et mutus a natiuitate*. For cases bearing on this question, see *Steel's Case*, 1 Leach, 451; *Jones' Case*, 1 Leach, 102; *Rex v. Pritchard*, 7 C. & P. 303; *Rex v. Dyson*, 7 C. & P. 305, note (a); *Thompson's Case*, 2 Lewin C. C. 137; *Snyder v. Nations*, 5 Blackf. 295; *The People v. McGee*, 1 Denio, 19; *Commonwealth v. Hill*, 14 Mass. 207; *The State v. DeWolf*, 8 Conn. 93; *Christmas v. Mitchell*, 3 Ired. Eq. 535; *Dickenson v. Blissott*, 1 Dick. 268. In *Snyder v. Nations*, 5 Blackf. (Ind.) 295, it was held that a witness being deaf and dumb forms no objection to his admissibility; but that such a person, who can be communicated with by signs, is a competent witness at common law, if he has sufficient discretion and a proper sense of the sanctity of an oath. *A fortiori*, where a deaf and dumb person can be communicated with by means of writing, as usually now can be done, the old presumption against his ability to contract, or his liability for his acts, is virtually of no force. See *John Ruston's Case*, 1 Leach, 455.

The act of an idiot before inquest found is voidable only, like the contract of an infant or insane person. *Burnham v. Kidwell*, 113 Ill. 425; *Allis v. Billings*, 6 Mete. 415; *Gibson v. Loper*, 6 Gray, 279; *Hovey v. Hobson*, 53 Me. 455; *Chew v. Bank of Baltimore*, 14 Md. 308; *Scanlan v. Cobb*, 85 Ill. 296. And the contract of the infant cannot be rescinded, and he recover back the property he has parted with, and still retain the consideration for the property sold. *Burnham v. Kidwell*, 113 Ill. 425; *Scanlan v. Cobb*, 85 Ill. 296; *Eaton v. Eaton*, 37 N. J. L. 108; *Lincoln v. Buckmaster*, 32 Vt. 659; *Carr v. Halliday*, 5 Ired. Eq. 67. In *House v. House*, 6 Ind. 60, where an adult idiot

son was living with his father as a member of the family, and was supported by him, and subsequently they were both received to board with the plaintiff, the father having said that he would pay for the support of his idiot son; it was held that the jury were right in finding that a contract for the father to pay for the support of the idiot son might be inferred from the circumstances. For further cases relating to idiocy, see *Lang v. Whidden*, 2 N. H. 435; *Treat v. Peck*, 5 Conn. 280; *Teal v. Woodworth*, 3 Paige, 470; *Faulkner v. McClure*, 18 Johns. 134; *In re Mason*, 1 Barb. 436; *Brown v. Chase*, 4 Mass. 436; *Webster v. Woodward*, 3 Day, 90; *Rice v. Peat*, 15 Johns. 503; *Yates v. Baen*, 2 Str. 1104; *In re Vananken*, 10 N. J. Eq. 186.

¹ Co. Litt. 247; 4 Co. 124. *Omne crimen ebrietas incendit et detegit*. Plowd. 19.

² There is a material distinction between what a drunkard does against another *in invitum*, and what a party does with respect to him by way of contract, knowing him to be drunk. *Per Alderson, B.*, in *Gore v. Gibson*, 13 M. & W. 624.

³ According to the old authorities, a man was not allowed to stultify himself by alleging his own incapacity to contract, whether from insanity or drunkenness, which was held a crime in itself, and, therefore, as not affording any excuse for other crimes, or for avoiding a civil contract. Co. Litt. 247 a, b; *Beverley's Case*, 4 Co. 123 b. All the old authorities were to this effect. See *Jenk. Cent.* 40; *Fitz. N. B.* 202 D; 1 Rolle, 2; *Br. Pails*, 62; *Cr. Eliz.* 398, 622; *Johnson v. Medlicott*, 3 P. Wms. 130, note A.

⁴ *Per Parke, B.*, in *Gore v. Gibson*, 13 M. & W. 626; *Yates v. Boen*, 2 Stra. 1104; *Cole v. Robins*, Bull. N. P. 172; *Cooke v. Clayworth*, 18 Ves. 12; *Thompson v. Leech*, 2 Ven. 198; *Smith v. Carr*,

A drunkard, like a lunatic, is liable for necessities,¹ and his contract is voidable only and not void, and is therefore capable of ratification by him when he becomes sober.²

cited in *Yates v. Boen*, *supra*; *Molton v. Camroux*, 4 Ex. at p. 19. In *Gore v. Gibson*, 13 M. & W. 625, Pollock, C. B., said: "Although formerly it was considered that a man should be liable upon a contract made by him when in a state of intoxication, on the ground that he should not be allowed to stultify himself, the result of the modern authorities is, that no contract made by a person in that state, when he does not know the consequences of his act, is binding upon him. That doctrine appears to me in accordance with reason and justice. With regard, however, to contracts which it is sought to avoid on the ground of intoxication, there is a distinction between *express* and *implied* contracts. Where the right of action is grounded upon a specific distinct contract requiring the assent of both parties, and one of them is incapable of assenting, in such a case there can be no binding contract; but in many cases the law does not require an actual agreement between the parties, but implies a contract from the circumstances. In fact, the law itself makes the contract for the parties. Thus, in actions for money had and received to the plaintiff's use, or money paid by him to the defendant's use, the action may lie against the defendant, even though he may have protested against such a contract. So, a tradesman who supplies a drunken man with necessities may recover the price of them if the party keeps them when he becomes sober, although a count for goods bargained and sold would fail. In this case the defendant is still liable for the consideration for his indorsement, although the indorsement itself can give the plaintiff no title." And, accordingly, the plea of the defendant, in an action by the indorsee of a bill of exchange against the indorser, that when he indorsed the bill he was so intoxicated, and thereby so entirely deprived of sense, understanding, and the use of his reason, as to be unable to comprehend the meaning, nature, or effect of the indorsement, or to contract thereby; of which the plaintiff, at the time of the indorsement, had notice, was held a good plea. *Gore v. Gibson*, 13 M. & W. 623. Courts of equity, on grounds of public policy, do not incline, on the one hand, to lend their assistance to a person who has obtained an agreement or deed from another in a state of intoxication; and, on the other hand, they are equally unwilling to assist the intoxicated

party to get rid of his agreement or deed, merely on the ground of his intoxication at the time. They will leave the parties to their ordinary remedies at law, unless there is some fraudulent contrivance or imposition practised. *Campbell v. Ketcham*, 1 Bibb, 406; *White v. Cox*, 3 Hayw. 82; *Wigglesworth v. Steers*, 1 Hen. & M. 70; *Taylor v. Patrick*, 1 Bibb, 168. See, also, as to the effect of intoxication on contracts, *Barrett v. Baxton*, 2 Aiken, 167; *King v. Bryant*, 2 Hayw. (N. C.) 394; *Borroughs v. Richman*, 1 Green, 243; *Reinicker v. Smith*, 2 Har. & J. 423; *Arnold v. Hickman*, 6 Munf. 15; *Williams v. Inabuet*, 1 Bailey, 343; *Seymour v. Delaney*, 3 Cow. 445; *Dorr v. Munsell*, 13 Johns. 430; *Butler v. Mulvihill*, 1 Bligh, 137; *Cole v. Robins*, Bull. N. P. 172; *Pitt v. Smith*, 3 Campb. 34; *Stockley v. Stockley*, 1 Ves. & Bea. 31; *Rich v. Sydenham*, 1 Ch. Cas. 202; *Say v. Barwick*, 1 Ves. & Bea. 199; *Dunnage v. White*, 1 Swanst. 150; *Mountain v. Bennett*, 1 Cox, 353; *Faine v. Brown*, cited in 2 Ves. Sen. 307. But a contract obtained by fraud and circumvention from a person in a state of intoxication is void in equity. *Butler v. Mulvihill*, 1 Bligh, 137; *Rich v. Sydenham*, 1 Ch. Cas. 202; *Say v. Barwick*, 1 Ves. & Bea. 199; *Dunnage v. White*, 1 Swanst. 150; *Mountain v. Bennet*, 1 Cox, 353; *Faine v. Brown*, cited in 2 Ves. Sen. 307; *Anonymous Case*, cited in 8 Ves. 67; *Cowly v. Nailor*, 118 U. S. 127. And where there is any unfair advantage made of his situation, or any contrivance or management to draw him into drink, he is a proper object of relief in a court of equity. *Cooke v. Clayworth*, 18 Ves. 15; *Cory v. Cory*, 1 Ves. 19; *Johnson v. Medlicott*, 3 P. Wms. 130, note *a*. But a party cannot, in general, resist specific performance merely upon the ground of his intoxication at the time of making the contract, the other party not having been aware of his condition. *Lightfoot v. Heron*, 3 Y. & C. 586; *Shaw v. Thackray*, 1 Sm. & G. 537. But a contract, unreasonable in itself, entered into by an habitual drunkard when in a state of excitement from excessive drinking almost amounting to madness with a person who, at the time, had him in complete subjection, will be set aside. It is not necessary in such a case to prove actual madness. *Wiltshire v. Marshall*, 14 W. R. 602; 14 L. T. N. S. 396.

¹ *Gore v. Gibson*, 13 M. & W. 623.

² *Matthews v. Baxter*, 8 L. R. Ex. 132;

Molton v. Camroux, 2 Ex. 487; *Wigglesworth v. Steers*, 1 Hen. & M. 70.

See, further, as to a drunkard's contracts, *Darby v. Cabanné*, 1 Mo. App. 126; *Menkins v. Lightner*, 18 Ill. 282; *Wigglesworth v. Steers*, 1 Hen. & M. 70; *Hall v. Warren*, 9 Ves. 608; *Niell v. Morley*, 9 Ves. 478; *Say v. Barwick*, 1 Ves. & B. 199; *McCrillis v. Bartlett*, 8 N. H. 569; *Coombs v. Janvier*, 31 N. J. L. 240; *Clarke v. Dunham*, 4 Den. 262; *Wadsworth v. Sherman*, 14 Barb. 169; *L'Amoureux v. Crosby*, 2 Paige, 427; *Griswold v. Miller*, 15 Barb. 520; *Tozer v. Saturlee*, 3 Grant (Pa.), 162; *In re Heller*, 3 Paige, 199; *Copenrath v. Kienby*, 83 Ind. 18; *Motley v. Head*, 43 Vt. 633; *In re Tracey*, 1 Paige, 580; *Underhill v. Jackson*, 1 Barb. Ch. 73; *Ridgway v. Darwin*, 8 Ves. 65. In *Jenners v. Havard*, 6 Blackf. 240, the court held that mental incapacity at the time of contracting, produced by drunkenness or any other cause, is a good defence against a contract, whether that contract be evidenced by deed or parol. Drunkenness of itself merely, unless fraud be practised, will not avoid a contract;

but if the party be in such a state of intoxication that he is for the time deprived of reason, it will do so. In *Harbison v. Lemon*, 3 Blackf. 51, where a contract was sought to be set aside on the ground of intoxication, the contract not having been shown to be unfair, nor was there any proof that the intoxication was produced by the contrivance of the other party to the contract, the court held, that to set the contract aside, in the absence of fraud, it must be shown that the drunkenness was so great as to produce an absolute privation of understanding for the time, similar to cases of idiocy or insanity. This doctrine is sustained by both English and American authorities. See *Pitt v. Smith*, 3 Camp. 33; *Fenton v. Holloway*, 1 Stark. 126; *Baxter v. Earl of Portsmouth*, 7 D. & Ry. 614; *Cooke v. Clayworth*, 18 Ves. 12; *Gore v. Gibson*, 13 M. & W. 623; *Yates v. Boen*, 2 Str. 1104; *Cole v. Robbins*, Bull. N. P. 172; *Mitchell v. Kingman*, 5 Pick. 431; *Samuel v. Marshall*, 3 Leigh, 567; *Barrett v. Buxton*, 2 Aiken, 167; *Prentice v. Achorn*, 2 Paige, 30.

BOOK II.

PART III.

MARRIED WOMEN.

1. GENERAL PRINCIPLES.

AT common law a married woman is incapable of making a valid contract so as to render herself liable thereon, and any attempted contract made with her, unlike those made with infants, lunatics, and drunkards, is absolutely void;¹ and, therefore, is incapable of being ratified by her after her coverture has ceased.² The personality of the wife is merged in that of her husband,³ and so far as her contracts at common law are binding at all, they are binding on the husband.⁴

¹ "The contract is void, for a *feme covert* has not power of herself to make any contract. And it is not like to the case of infants, for their contracts are to some intents good, and may be made good by them at their age; but the contracts of *femes coverts* are absolutely void, for they have not any power of will, but are subject to the will of their husbands." *Manby v. Scott*, 1 Lev. at p. 6.

² See *Marshall v. Rutton*, 8 T. R. 545; *Morris v. Norfolk*, 1 Taunt. 212; *France v. White*, 1 M. & G. 731; *Burch v. Leeke*, 7 M. & G. 377. When a married woman, who is also an infant, executes an instrument with her husband, which is void because of her infancy, she has a reasonable time after the coverture has ceased to avoid the act. *Sims v. Everhardt*, 102 U. S. 300.

³ They are "one person in the law." Co. Litt. 112a.

⁴ In *Carn v. Brice*, 10 L. J. Ex. 28, a wife's clothes, bought with her separate income, were seized under an execution against her husband. And this rule still prevails wherever the common law is in force, and is not varied by married women's relief acts. By the common law the personal property of the wife is the absolute property of the husband, and, at his death, becomes assets in the hands of his

personal representative, and if the husband and wife sell and convey her land, and he receives the consideration-money without any reservation of rights on her part, the money belongs to him. *Kenser v. Trigg*, 98 U. S. 50; *Hambin v. Jones*, 20 Wis. 536.

It was held in Illinois, that, as it is a presumption always indulged in by the courts that the common law prevails in such of the States of the Union as are formed from territory which once belonged to the colonies of England, unless it is proven as a fact to the contrary, it will be presumed in Illinois that the common law prevails in Indiana and Wisconsin, as regards the marital rights of the husband. It was hence held that furniture bought by the wife, out of money given to her by her father before her marriage, and earned by her after her marriage, and which moneys she had with her in Indiana and Wisconsin, kept in her own possession, control, and management, was liable, at common law, to be taken in Illinois under an execution issued against her husband; such furniture not having been brought within the protection of the Married Woman's Act of 1874. *Hanchett v. Rice*, 22 Ill. App. 442. Accord, *Dubois v. Jackson*, 49 Ill. 49; *Cummings v. Cummings*, 143 Mass. 340; *Farrell v. Patterson*, 43

2. MARRIED WOMEN LIVING WITH THEIR HUSBANDS.

While a wife is living with her husband, the general rule is that a wife cannot bind her husband by her contract, except as his

Ill. 52; *Tinkler v. Cox*, 68 Ill. 119; *Savage v. O'Neil*, 44 N. Y. 298; *Lichtenburger v. Graham*, 50 Ind. 288; *Reeves v. Webster*, 71 Ill. 307; *Walker v. Reamey*, 36 Pa. St. 416. So, in *Hamill v. Henry*, 69 Iowa, 752, it was held, in an action in chancery to subject certain real estate, the title whereof was in a wife, to a judgment against her husband, that moneys paid for the purchase of the property from the earnings of the wife (who was living with her husband), in keeping boarders in the family, selling butter and milk and the like, belonged to the husband, and the property to that extent was subject to the judgment against him. See *Croup v. Morton*, 49 Iowa, 16, to the same effect. In Georgia (Code, §§ 1756-1760), where a wife has been living separate from her husband, or has been declared "a public or free trader," under the Code, then, in either event, her acquisitions become her separate estate, to which the marital rights of her husband do not attach. But when she is living with her husband, and has not been declared "a public or free trader," her earnings, no matter in point or principle of law how claimed, whether from keeping a boarding-house, or from washing, ironing, or cooking, vest in her husband, and real estate bought by him with such earnings is liable to his debts, and is not affected by any trust in favor of his wife. *Gorman v. Wood*, 73 Ga. 570; 68 Ga. 524. And, notwithstanding the statutes which have been passed giving to married women rights of property against the husband and his creditors, property purchased by a woman on credit, or with her earnings, has been held to be subject to the levy of an execution against her husband. *Robinson v. Wallace*, 3 Wright, 129. And where the contest was between a wife and her husband's creditors, it was ruled that mere evidence that she purchased the property during the coverture was not sufficient to give her title; that it must be satisfactorily shown that the property was paid for with her own separate funds, and, that, in the absence of such evidence, the presumption is a violent one, that the husband furnished the means of payment; and it was held that this rule applies to the purchase of both real and personal estate. *Keeny v. Good*, 21 Pa. St. 349; *Gamber v. Gamber*, 18 Pa. St. 306. And to overcome this presumption there must be satisfactory evidence that the money was her own and not that of her husband. *Seitz*

v. Mitchell, 94 U. S. 580; *Walker v. Reamey*, 36 Pa. St. 410; *Parvin v. Cape-well*, 9 Wright, 89; *Bradford's Appeal*, 5 Casey, 513; *Aurand v. Shaeffer*, 7 Wright, 363; *Switzer v. Valentine*, 4 Duer, 96; *Glann v. Younglove*, 27 Barb. 480; *Woodbeck v. Havens*, 42 Barb. 66; *Rider v. Hulse*, 24 N. Y. 372; *Camors v. Camors*, 4 Wis. 131; *Elliott v. Bentley*, 17 Wis. 610; *Edson v. Hayden*, 20 Wis. 682; *Duncan v. Roselle*, 15 Iowa, 501; *Cramer v. Redford*, 17 N. J. Eq. 367. In Missouri, too, it has been held, that the Married Women's Acts are to be strictly construed, on the ground that statutes innovating upon well-established common-law principles are to be restricted to the limits of the precise extent to which the language of the statute goes, and to extend no further. Hence, on the common-law presumption that personal property found in the possession of a *feme covert* is the property of her husband, — her possession being his possession, — where a married woman undertook by her own testimony, unsupported by any other evidence, to overcome this presumption, and the jury found against her, the court refused to disturb the verdict. *Hemelreich v. Carlos*, 24 Mo. App. 264. See, also, *McFerran v. Kinney*, 22 Mo. App. 555; *Weil v. Simmons*, 66 Mo. 619, 620. In Alabama, also, it has been held that the earnings of the wife are the property of the husband, and though the husband may renounce all right to the earnings of the wife, and permit her to retain them as her own, such renunciation is void as against his existing creditors. *Glaze v. Blake*, 56 Ala. 379; *Gordon v. Tweedy*, 71 Ala. 202; *Bovett v. Potter*, 80 Ala. 476; *Bynum v. Frederick*, 81 Ala. 489; *Shaeffer v. Sheppard*, 54 Ala. 244; *Carleton v. Rivers*, *Id.* 467; *McLemore v. Pinkston*, 31 Ala. 266, 308. And in *Booker v. Waller*, 81 Ala. 550, it was held, that a husband could not create for his wife a separate estate, to the prejudice of those to whom he was under legal obligations, and that he could not vest her with a separate estate even in her future earnings to the prejudice of existing creditors; and that, where property had been purchased in the name of a *feme covert*, the burden was upon her to prove distinctly that she paid for the thing purchased with funds that were not furnished by the husband. Evidence that she purchased amounts to nothing, unless it is accompanied with clear and full proof

agent. There are, however, cases in which a jury may infer such agency. In the cases of orders given by the wife in those departments of her husband's household which she has under her control, the jury may infer that the wife was the agent of her husband till the contrary appears. So, for such articles as are necessary for the wife, such as clothes, if the order is given by the wife, and she is living with her husband, and nothing appears to the contrary, the jury do right by inferring the agency: but if the order is excessive in point of extent, or if, when the husband has a small income, the wife gives extravagant orders, these are circumstances from which the jury would infer that there was no agency. The tradesman who supplies the goods takes the risk; and if the bill is one of an extravagant nature, such as the husband would never have authorized, that would alone be sufficient to repel the inference of agency.¹

that she paid for it with her own separate funds; not that she had the means of paying, but that she in fact paid. In the absence of such proof, the presumption is that her husband furnished the means of payment. See *McAnally v. O'Neal*, 56 Ala. 299; *Gamber v. Gamber*, 18 Pa. St. 363; *Keeny v. Good*, 21 *Id.* 349; *Hallowell v. Hoster*, 35 *Id.* 375; *Winter v. Walter*, 37 *Id.* 155; *Robinson v. Wallace*, 39 *Id.* 129. But, in Alabama, under the Code of 1876, § 2709, it was held, where personal property purchased by the husband was paid for with money that was of the *corpus* of the wife's statutory separate estate, the property thus purchased became the separate estate of the wife, and that the products of lands which were the statutory estate of the wife, could not be taken for payment of the husband's debts. *Kennon v. Dibble*, 75 Ala. 351. See *Flournoy v. Owens*, 74 Ala. 446. And see *Bridgman v. Bridgman*, 138 Mass. 58; *Howard v. Bryant*, 9 Gray, 239; *Alexander v. Crittenden*, 4 Allen, 342; *Commonwealth v. Manley*, 12 Pick. 173; *Turner v. Nye*, 7 Allen, 176, as to reduction of a wife's *choses in action* to possession. And see, also, as to a husband's rights therein, in Indiana, on surviving his wife, not having reduced the *chose* into possession, *Bunn v. Critchell*, 110 Ind. 31. See as to the exemption of a *feme covert* from liability under her contracts, where her separate estate is not charged, *Post v. Koch*, 30 Fed. Rep. 208; or where she has none, *Condon v. Barr*, 49 N. J. L. 53; *Eckert v. Reuter*, 4 Vroom, 266; *Von Kirk v. Skillman*, 5 Vroom, 109; *Lewis v. Perkins*, 7 Vroom, 133; *Wilson v. Herbert*, 12 Vroom, 454, *Penty v. Simonson*, 2 Beas. 232. Real estate paid for by a member of

a firm out of the assets of the firm, and conveyed to his wife, was, on the bankruptcy of the firm, held to be the assets of the firm. *Phipps v. Sedgwick*, 95 U. S. 3.

In the *National Bank of Rahway v. Brewster*, 49 N. J. L. 231, an action was brought, by the indorsee before maturity, against a married woman, on a note given by her to a firm of which her husband was a member. It was held that the contract between husband and wife was null and void, and that the defect was inherent in the contract, which, therefore, could not be enforced at law. In *Gould v. Gould*, 8 Stew. Eq. 37, affirmed, *Id.* 562, a wife lent money to her husband's firm upon their promissory note. After his death, she brought suit at law against the surviving members of the firm. She was nonsuited, and it was held that in order to recover the money she must have recourse to equity.

¹ *Freestone v. Butcher*, 9 C. & P. 643, *per Lord Abinger*; *Atkins v. Curwood*, 7 C. & P. 756; *Waithman v. Wakfield*, 1 Camp. 129; *Etherington v. Parrot*, 1 Salk. 118; *Scott v. Manby*, Sid. 109; *Montague v. Espinasse*, 1 C. & P. 356, 502; *Houlston v. Smith*, 2 C. & P. 22; *Mainwaring v. Leslie*, *Id.* 507; *Clifford v. Laton*, 3 C. & P. 15; *Reed v. Moore*, 5 C. & P. 200; *Atkins v. Curwood*, 7 C. & P. 756. In *Lane v. Ironmonger*, 13 M. & W. 368, the court held that the law as laid down in *Freestone v. Butcher*, 9 C. & P. 647, is substantially correct, though there may be a trifling inaccuracy in stating that the extravagance of the bill would *alone* repel the inference of agency; that that alone, perhaps, would not be sufficient, but it might be repelled by that and other

As stated above, the whole question is one of agency, express or implied. Where a plaintiff seeks to charge a husband on a

circumstances together. But in this case (*Lane v. Ironmonger*) the judge, at the trial, read, approved, and adopted the law as laid down in *Freestone v. Butcher* by Lord Abinger; and the Court of Exchequer, in *Lane v. Ironmonger*, by their judgment sustained the ruling. The court thus further laid down the law: "The whole turns upon the question of the husband's authority; and it is for the jury to say whether the wife had any such authority, and whether the plaintiff, who supplied her with these articles, must not have known that she was exceeding her husband's authority to pledge his credit. If he had any doubts upon the subject he might have made inquiries of the husband. It was not proved that the husband knew the articles had been ordered or saw his wife wearing them." And the verdict of the jury for the defendant, in an action against him for £52s7 "for bonnets, feathers, lace, and ribands," supplied by the plaintiff to the defendant's wife during part of one year, was sustained. *Lane v. Ironmonger*, 13 M. & W. 368. See, also, *Montague v. Benedict*, 3 B. & C. 635; *Jewsbury v. Newbold*, 26 L. J. Ex. 247; *Filmer v. Lynn*, 4 N. & M. 559. Where the presumption of law in favor of an authority to contract rests upon the fitness of the party who has received them, it may as well be repelled by a deviation from what is proper in point of quantity as of quality. *Johnson v. Lines*, 6 W. & S. 80. But as it is a question of agency, the proper question to be submitted to the jury is not whether the goods supplied were necessities for a person in the station in life of the party, but whether, under all the circumstances, there was any authority in the wife, express or implied, to contract for them as her husband's agent. *Reid v. Teakle*, 13 C. B. 627. Or, as is laid down by Bayley, J., in *Montague v. Benedict*, 3 B. & C. 631, whenever the husband and wife are living together, and he provides her with necessities, the husband is not bound by contracts of the wife except where there is reasonable evidence to show that the wife has made the contract with his assent. *Etherington v. Parrot*, 2 Ld. Raym. 1006; 1 Salk. 118. The question of agency must be left to the jury on all the facts. *Seaton v. Benedict*, 5 Bing. 28; *Manby v. Scott*, 1 Lev. 4; *Freestone v. Butcher*, 9 C. & P. 643; *Lane v. Ironmonger*, 13 M. & W. 368; *Frost v. Willis*, 13 Vt. 292; *Shelton v. Hoadley*, 6 Ala. 651; *Shelton v. Pendleton*, 18 Conn. 417; *Fredd v. Eves*, 4 Harring. 385; *Camerat*

v. Goldsmith, 4 Ga. 14; *Cornelia v. Ellis*, 11 Ill. 584; *Sawyer v. Cutting*, 23 Vt. 486; *Alexander v. Miller*, 16 Penn. 215. But cohabitation with a wife, or with a woman who is held out to the world as being a wife, is evidence of the existence of an implied authority to her to purchase whatever is reasonably necessary for herself and the family of her real or supposed husband. See previous authorities cited in this note, and see *Ruddock v. Marsh*, 1 H. & N. 601, which, except as confined to the special circumstances of the case, and as regards authority which would as much exist in favor of a sister, a house-keeper, or other person presiding over the management of the house, was doubted by *Bramwell, L. J.*, in *Debenham v. Mellon*, 5 Q. B. Div. at p. 399, where it was held that the wife is the general agent of her husband with reference to such matters as are usually under the control of the wife, and, therefore, where the wife of a laborer incurred a debt for provisions for the use of the family, the husband was held liable, "with reference to the circumstances of this case," though he had supplied his wife with money to keep the house; and *Read v. Legard*, 6 Ex. 636, where it was held that a husband is liable for necessities supplied to his wife during the period of his lunacy. See also *Furlong v. Hysom*, 35 Me. 332; *Mitchell v. Treanor*, 11 Ga. 324; *McCutcheon v. McGahay*, 11 Johns. 281; *Cary v. Patton*, 2 Ashm. 140. But see *Holt v. Brien*, 4 B. & Ald. 252, where the plaintiff knew that the wife had an allowance for necessities from her husband. As to what are necessities, see *Morgan v. Chetwynd*, 4 F. & F. 451; *Jewsbury v. Newbold*, 26 L. J. Ex. 247; *Reneaux v. Teakle*, 2 Ex. 680; *Atkins v. Curwood*, 7 C. & P. 756. Where husband and wife are cohabiting it is a presumption of fact that she is his agent for ordering articles supplied to their establishment which are suitable to the station which he allows her to assume; but if they be unsuitable to that station a presumption arises that she was not his agent to pledge his credit for them. *Harrison v. Grady*, 12 Jur. n. s. 140; 13 L. J. 369.

A husband who is able and willing to supply his wife with necessities, and who has forbidden her to pledge his credit, cannot be held liable for necessities bought by her; and a tradesman, without notice of the husband's prohibition, and without having had previous dealings with the wife with his assent, cannot maintain an action against him for the price of articles of

contract made by his wife, the question is whether the wife had his authority, express or implied, to make the contract; and that,

female attire suitable to her station in life, and supplied to her upon his credit, but without his knowledge or assent. *Debenham v. Mellon*, 5 Q. B. D. 394, affirmed in the House of Lords, *1b*. 6 Ap. Cas. 24.

The law on the subject in this country is well settled, and it is and has long been precisely in accordance with the latest and most critical of the English cases. We have nowhere found the law more clearly or correctly laid down than it is by Woodruff, J., in *Keller v. Phillips*, 39 N. Y. 351; 40 Barb. 390; thus: "The rules of law relating to the power of the wife to bind her husband to payment for goods purchased by her for the use of herself and the family are well settled. The husband is bound to provide for her and them whatever is necessary for their suitable clothing and maintenance according to his and their situation and condition in life. And ordinarily he will be presumed to assent to her making such purchases as in the conduct of the domestic concerns are proper for her management and supervision; but he is at liberty to withhold such assent and destroy such presumption by an express prohibition; and if he do so, no one, having notice thereof, may trust the wife in reliance upon his credit, unless the husband so neglects his own duty that supplies become absolutely necessary according to their condition. In the present case, therefore, the sale of the goods being proved, or not being denied by the defendant, the burden of proof was upon the defendant to show that the credit was given against his express dissent, and notice thereof to the plaintiffs. This being proved, the burden was upon the plaintiffs to show that the defendant did not suitably provide for his family according to his and their condition. Of that the plaintiffs were not to be the judges except at the risk of establishing it by proof, and of that they offered no testimony whatever; but on the trial objected to the defendant's proving affirmatively that he did so, and the justice excluded evidence offered by him tending to show in what mode, and in part to what extent, that provision was made. The defendant was not bound to show affirmatively that he did so provide, and yet, so far as he appears to have been permitted, his testimony went to show that he did make suitable provision. Nor is it enough that the articles sold are in their nature and description necessary and suitable for the use of the wife and family. If they were not so there would be no presumption of the husband's assent to the purchase in any case. It is indispensable,

where the vendor has been forbidden to sell upon the wife's request on the husband's credit, that the vendor show not only that the goods were in their nature suitable and necessary, but that the husband neglected his duty to provide supplies, and that for that reason they were necessary. These rules are elementary. Modern legislation, in preserving to the wife all her own property, has taken away some of the grounds upon which the duty of the husband was placed by the common law; but it has not yet gone so far as to invest the wife with a discretion which the husband cannot control, and enable her to spend his property or involve him in debt against his will." This sound exposition of the law has been followed in this country with even greater uniformity than it has been in England, where, as will be seen from the authorities we cite, some of the decisions cannot be supported, and have been in effect overruled by some of the latest cases. See, further, *Mott v. Comstock*, 8 Wend. 544; *Kimball v. Keyes*, 11 Wend. 33; *Blowers v. Sturtevant*, 4 Denio, 49; *Gilman v. Andrus*, 28 Vt. 241; *Waithman v. Wakefield*, 1 Camp. 121, *per* Lord Ellenborough; *Sawyer v. Cutting*, 23 Vt. 486; *Benjamin v. Benjamin*, 15 Conn. 347; *Felker v. Emerson*, 16 Vt. 653; *Church v. Landers*, 10 Wend. 79; *Rotch v. Mills*, 2 Conn. 638; *Hughes v. Chadwick*, 6 Ala. 651. In *Savage v. Davis*, 18 Wis. 608, the law is succinctly laid down thus:—

"A wife may undoubtedly act as the agent of her husband, and in that character transact his business, control his property, and make contracts in respect to it which will bind him. This agency, its nature and extent, and whether it includes the particular contract, may, as in other cases, be inferred from a variety of circumstances. It is a question for the jury to determine from all the evidence, whether the wife had the authority to do the act or make the contract in question, or whether her act, unauthorized at the time of its performance, was rendered valid by a subsequent ratification by the husband. In the management of household affairs it is said that it will be presumed, until the contrary appears, that she acts as the agent of her husband (*Pickering v. Pickering*, 6 N. H. 120); but her power to bind her husband by her contracts rests upon the sole ground of agency, she having as wife no original and inherent power to bind him by any contract made by her." *Leeds v. Vail*, 15 Pa. St. 185; *Freestone v. Butcher*, 9

if there be express authority, there is no room for doubt; and if the authority is to be implied, the presumptions which may be ad-

C. & P. 643; *Day v. Burnham*, 36 Vt. 37; *Johnston v. Pike*, 14 La. Ann. 731; *Morgan v. Hughes*, 20 Tex. 141; *Furlong v. Hysom*, 35 Me. 332; *Etherington v. Parrot*, 1 Salk. 118; *McCutchen v. Mc Gahay*, 11 Johns. 281. The law as laid down in *Holt v. Brien*, 4 B. & Ald. 252, was followed in *Harshaw v. Merryman*, 18 Mo. 106, that if the husband makes a reasonable allowance to the wife for necessities, during his temporary absence, and a tradesman, with notice of this, supplies her with goods, the husband is not liable unless the tradesman can show that the allowance was not supplied. See further, as to the husband's liabilities on his wife's contracts, *Sterling v. Potts*, 5 N. J. L. 773; *Williams v. Coward*, 1 Grant (Pa.) Cas. 21.

In *Therriott v. Bagioli*, 9 Bosw. (N. Y.) 578, the plaintiffs sold goods to the defendant's wife, after having been forbidden by the husband to do so. The court held that the plaintiffs could not recover, unless under a subsequent promise to pay, or that they made it appear that the articles furnished were necessary and suitable to her condition in life, and that she was not otherwise provided for by her husband. The husband is bound to provide his wife with necessities suitable to her situation and his condition in life. He is bound by her contracts for ordinary purchases, from a presumed assent on his part; but if his dissent be previously made known, the presumption of his assent is rebutted, and he is not liable, unless the seller shows the absolute necessity of the purchase for her comfort. *Etherington v. Parrot*, 1 Salk. 118. Outside of the matter of necessities, a wife, as such, has no original or inherent power to make any contract which is obligatory on her husband. No such right arises from the marital relation between them. If, therefore, she possesses a power in any case to bind him, by her contracts made on his behalf, it must be by virtue of an authority derived from him, and founded on his assent; although such assent may be precedent or subsequent, and express or implied. Where such authority is conferred, the relation between them and the consequences of that relation are analogous to those in the ordinary case of principal and agent. And that she has the capacity to be constituted, by the husband, his agent, and to act as such equally with any other person, there is no doubt. *Fitz. Nat. Brev.* 120 G.; *Vin. Abr. tit. Baron & Feme*, E. A.; 1 Bac. Ab. 499; *Bull. N. P.* 136.

But, admitting the correctness of these principles, it was held in *Benjamin v. Benjamin*, 15 Conn. 347, in a well-considered judgment, that, as a presumption arising from the state of society, the law will, in some cases, presume the wife to be the agent of the husband, when no such presumption would exist as to another person; and also will, in some cases, imply a larger authority to the wife than to an ordinary agent; and this perhaps, whether the husband be absent from home or not; and that, in other cases, where he is absent, a presumption would arise that his wife has authority to act in his behalf, which would not exist if he were at home; these inferences being founded on the fact that it is usual and customary to permit the wife to act in such cases. See *Meador v. Page*, 39 Vt. 306, where the wife's agency was sustained; *Anon.*, 1 Str. 527; *Church v. Landers*, 10 Wend. 79; *Spencer v. Tisne*, *Addis. R.* 316. But this does not sanction the doctrine that the wife, whether the husband is abroad or at home, is presumed to be the agent of her husband generally, or to be entrusted with any other authority as to his affairs, than that which it is usual and customary to confer upon, the wife. It would be not only unreasonable, and, as it respects the husband's interests, unsafe; but it would be going beyond what could fairly be presumed to be his intention, to extend the powers of the wife by implication or presumption farther than this principle warrants. Hence, in *Benjamin v. Benjamin*, 15 Conn. 347, it was held, that the husband was not bound by a contract made by his wife, not for necessities, and not within the scope of her agency, in respect to a matter that would only belong to his general agent, or to one to whom a special authority was given. But, as frequently is the case where a married woman, by the cruelty of her husband is driven from his home without means of support, — a subject which we fully consider in the next section of this Part, — the husband may be liable for necessities furnished the wife, in certain cases, though the existence of an agency or assent, express or implied in fact, is wholly disproved by the evidence; and this, upon the ground of agency implied in law, though there can be none presumed in fact. It is a settled principle in the law of husband and wife, that, by virtue of the marital relation, and in consequence of the obligations assumed by him upon marriage, the husband is legally bound for the supply of necessities to the

vanced on one side may be rebutted on the other; and although there is a presumption that a woman living with a man and represented by him to be his wife, has his authority to bind him by her contract for articles suitable to that station which he permits her to assume, still this presumption is always open to be rebutted.¹

But this does not militate against the rule that the husband, as well as every principal, is concluded from denying that the agent had such authority as he was held out by his principal to have, in such a manner as to raise a belief in such authority, acted on in making the contract sought to be enforced. On these principles, it was held that a verdict for necessities suitable to the estate and degree of the husband, obtained from the plaintiffs by the wife of the defendant without his authority and contrary to his order, could not be supported.² This case has been since repeatedly followed and approved, and it seems in harmony with all the well-decided cases on the subject. We follow up the consideration of the subject under the light cast upon it by the latest cases.

Where the husband neither does nor assents to any act to show that he has held out his wife as his agent to pledge his credit for goods supplied on her order, the question whether she bears that character must be examined upon the circumstances of the case. That question is one of fact. The management of the husband's house would raise a presumption of agency as to matters necessarily connected with that management, which might not be got rid of by a mere private arrangement between husband and wife; otherwise where such management did not exist.

Thus, A. was the manager of a limited company's hotel at Bradford, where his wife acted as manageress. They cohabited. He made his wife an allowance for clothes, but forbade her to pledge his credit for them. She purchased clothes in London, the bills

wife, so long as she does not violate her duty as wife; that is to say, so long as she is not guilty of adultery or elopement. The husband may discharge this obligation by supplying her with necessities himself or by his agents, or giving her an adequate allowance in money, and then he is not liable to a tradesman who, without his authority, furnishes her with necessities; but if he does not himself provide for her support, he is legally liable for necessities furnished to her by tradesmen, even though against his orders. *Cromwell v. Benjamin*, 41 Barb. 558. And whether the husband is liable for services rendered his wife, or goods supplied to her, though the general rule is that the husband is not liable without his assent,

express or implied, yet this assent may be inferred from circumstances, such as the necessity the wife stood in for them, and the relative situation of the parties, as connected with the treatment of each other; the question of necessities being a relative fact, depending upon the standing and circumstances of the party. *Shelton v. Hoadley*, 15 Conn. 535; *Ford v. Fothergill*, 1 Esp. 211. See *Segelbaum v. Ensminger*, 117 Pa. St. 248, where the wife's purchases, against the husband's notice, were held not to bind him.

¹ *Manby v. Scott*, 1 Sid. 109; *Etherington v. Parrot*, 2 Ld. Raym. 1006; 1 Salk. 118; *Jolly v. Rees*, 15 C. B. N. s. 628.

² *Jolly v. Rees*, 15 C. B. N. s. 628.

for which were made out in her name and were paid by her. She afterwards incurred with the same tradesmen a debt for clothes, payment for which was demanded from the husband, with whom, previously, they had had no communication. On the trial before Bowen, J., the jury found that, at the time the goods were ordered, the defendant had withdrawn from his wife authority to pledge his credit, and had forbidden her to pledge it. Judgment having been entered, accordingly, for the defendant, the Queen's Bench Division refused a new trial. On appeal to the Court of Appeals, the lords justices, following and adopting the decision in *Jolly v. Rees*,¹ affirmed the ruling in the court below.² The House of Lords sustained the judgment.³

¹ 15 C. B. N. s. 628; 33 L. J. C. P. 177.

² *Debenham v. Mellon*, 5 Q. B. D. 394.

³ *Ibid.*, 6 App. Cas. 24. The law on the question is thus laid down by Lord Blackburn in his judgment: "I premise, as did the majority of the court in *Jolly v. Rees* (15 C. B. N. s. 628; 33 L. J. C. P. 177), by saying that no question arises here as to what would be the case if the wife had been left destitute, and had not been allowed what was proper for her estate and condition. If there had been desertion and cruelty, so that she had not been supplied with what was proper, no question arises here as to whether she would not have had authority to pledge her husband's credit to get such things. That is not the case here at all. This is simply a case where a husband is living with his wife, though they are not keeping up any household establishment; and he in fact makes her an allowance which both husband and wife seemed to think, so far as one can judge from appearances, would be sufficient to enable her to supply herself with all necessary clothes. She did get clothes, and there was evidence which satisfied the jury that the husband really and truly told her that she was not to pledge his credit, and that she had assented. The question comes to be, first, had she, from her position as wife, authority to pledge her husband's credit, although the husband had revoked that authority? I grant that the fact of a man living with his wife, frequently, and indeed always, does afford evidence that he entrusts her with such authorities as are commonly and ordinarily given by husband to wife. I should say that it might be a matter of doubt whether it is so perfectly certain that the articles supplied by milliners are always to be procured upon the credit of the husband, so as to make that a *prima facie* part of the authority. But I will assume that it would be so. In the

ordinary case of the management of a household the wife is the manager of the household, and would necessarily get short and reasonable credit on butchers' and bakers' bills, and such things; and for those she would have authority to pledge the credit of the husband. I think that if the husband and wife are living together, that is a presumption of fact from which the jury may infer that the husband really did give his wife such authority. But even then, I do not think the authority would arise, so long as he supplied her with the means of procuring the articles otherwise. But that is not the present question, which is this: had the wife a mandate to order the clothes which it would be proper for her in her station in life to have, though the husband had forbidden her to pledge his credit, and had given her money to buy clothes? I think, for the reasons given by the majority of the court in *Jolly v. Rees* (15 C. B. N. s. 628; 33 L. J. C. P. 177), and also by the judges in the Court of Appeal in this case, that there is no authority and no principle for saying that the wife had authority to pledge her husband's credit. I quite agree that if the husband knew that the wife had got credit, if he had allowed the tradesmen to suppose that he himself had sanctioned the transactions, by paying them or in other ways, it might very well be argued that he would have given such evidence of authority that if he did revoke it he would be bound to give notice of the revocation to the tradesmen and to all who had acted upon the faith of his authority and sanction. That would be the general rule, for where an agent is clothed with an authority, and afterwards that authority is revoked, unless that revocation has been made known to those who have dealt with him, they would be entitled to say, 'the principal is precluded from denying that that authority continued to exist, which he had led us

The plaintiff sued the defendant for the price of goods supplied to the defendant's wife. The defendant, at the time the goods were supplied, was a clerk at £400 a year; living in a house the rent of which was £70 per annum; having two children, and keeping three servants; the wife having a separate income of £90 a year. The goods, though luxuries, were found by the jury to be suitable and proper to the wife's condition. The defendant had no knowledge that his wife was purchasing the goods, and swore that he had never bought any goods at the plaintiff's shop on credit; and that he had never authorized his wife to pledge his credit, but, on the contrary, had expressly desired her not to do so. Two successive juries gave verdicts for the plaintiff. In leaving the case to the latter of the two juries, the judge (Byles, J.) said: "For myself, I certainly had thought, but erroneously, that a tradesman was not bound by a limitation of the ordinary authority between husband and wife unknown to him. But the Court of Common Pleas has held a contrary opinion;¹ and the law is, as I understand it, that even if these things were all of them necessary, yet if the wife in point of fact, although the tradesman did not know it, was prohibited by her husband from incurring these or any other debts, the plaintiff cannot recover." On motion to enter a nonsuit, the principles governing the case were thus laid down:²—

"In this case the wife eloped from her husband, and then he for the first time discovered that she had been professing to pledge his credit for things which he never in any sense authorized her to purchase, and which he never before saw or heard of. If he is bound to pay for those articles it must be because the law infers from the relation of husband and wife some authority in the wife to order them. What the law does infer is that the wife has authority to contract for things that are really

to believe, as reasonable people, did formerly exist.' Now there may be many cases in which the husband has so sanctioned his wife's pledging his credit, but there is not any such case here. The case in Ireland to which we have been referred, seems, as far as I could see by a slight glance, to be a case where the husband had assented to the contracts in such a way that he could not deny them afterwards. With that we have nothing at present to do. But I cannot agree with my brother Byles that there is any authority established by the cases that the fact that a wife is living with a husband, alone entitles the tradesmen to presume that the husband has given an authority so as to preclude the husband from denying it. I

think that when husband and wife are living together, it is open to the husband to prove, if he can, the fact that the authority does not exist, it being a question for the jury whether a *bonâ fide* authority did or did not exist. This is not a case of withdrawing authority once given. The question is whether the plaintiffs, who had never dealt with the husband before, were entitled to assume that there was such an authority to the wife implied in the mere fact that the wife was living with her husband; and I think the law is not so." See *Moylan v. Nolan*, 17 Ir. C. L. R. 427; the Irish case referred to above.

¹ In *Jolly v. Rees*, 15 C. B. N. s. 628; 33 L. J. C. P. 177.

² *Per* Willes, J., at p. 42.

necessary and suitable to the style in which the husband chooses to live, in so far as the articles fall fairly within the domestic department which is ordinarily confided to the management of the wife. And it is incumbent on the tradesman who relies upon the goods coming within that description to prove affirmatively that they do so. The burden of proof lies on him. He must show, not that they must have been such articles as come within that implied authority, but so strong a probability that they were as to induce any reasonable mind to infer that the wife was acting under the authority of her husband. It is not enough, where the burthen of proof lies on the plaintiff, for him to prove facts which are equally consistent with the affirmative or the negative of the propositions sought to be made out." A nonsuit was entered accordingly.¹

¹ *Phillipson v. Hayter*, L. R. 6 C. P. 33. And see *Freestone v. Butcher*, 9 C. & P. 643; *Kelly v. Phillips*, 40 Barb. 390; *Cromwell v. Benjamin*, 41 Barb. 553; *Lane v. Ironmonger*, 13 M. & W. 363; *Ruddock v. Marsh*, 1 H. & N. 601; *Manby v. Scott*, Sid. 109; 1 Lev. 4; *Dyer v. East*, 1 Mod. 9; *Tod v. Stokes*, 12 Mod. 244; *Etherington v. Parrot*, 2 Ld. Raym. 1006; *Waithman v. Wakefield*, 1 Camp. 120; *Bolton v. Prentice*, 2 Str. 1214; *Holt v. Brien*, 4 B. & Ald. 252; *Montague v. Benedict*, 3 B. & C. 631; *Ryan v. Sams*, 12 Q. B. 460; *Read v. Legard*, 6 Ex. 636; *Johnston v. Sumner*, 3 H. & N. 261; *Reid v. Teakle*, 13 C. B. 627; *Munro v. De Chemant*, 4 Camp. 215; *Atkyns v. Pearce*, 2 C. B. N. s. 763; *Atkins v. Carwood*, 7 C. & P. 506; *Mizen v. Pick*, 3 M. & W. 481; *Richardson v. Du Bois*, L. R. 5 Q. B. 51; *Eastland v. Burchell*, 3 Q. B. D. 432; *Shoolbred v. Baker*, 16 L. T. 1357; *Moylan v. Nolan*, 17 Ir. C. L. R. 427.

By section 2214 of the Iowa Code it is provided "that expenses of the family are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately." In *Devendorf v. Emerson*, 66 Iowa, 698, the defendant, in writing, forbade plaintiffs to sell goods to his wife on his account, the husband having no account with the plaintiffs at the time. Plaintiffs thereafter sold to defendant's wife family supplies on the husband's account, and the same were used as such, and there was no evidence that there was a necessity for such purchase by the wife by failure of the husband to furnish said supplies. The court held, that while the section of the Code is a necessary protection to merchants who in good faith furnish family supplies, and authorizes them to look to the husband or wife for pay-

ment, without any investigation as to which of them is the owner of the family property; yet as the plaintiffs sold the goods to the wife, against his written protest, and knowing that the husband was supplying his family in his own way, the section did not take away the right of a provident husband to supply his family with a support and maintenance in his own way, in cases where the family depends upon him for support; and that, as he furnished the family supplies, the statute did not deprive him of the right to make the necessary purchases from such persons as he saw fit. The legal implication is that purchases of necessities, although made by the wife, are on account of the husband; and before the wife can be charged with liability, this implication must be overcome by proof that by her express contract, or by circumstances other than the purchase of the goods by her, fairly establishing a case of implied contract, she has assumed an individual responsibility. *Chester v. Pierce*, 33 Minn. 370; *Flynn v. Messenger*, 28 Minn. 203; *Wilson v. Herbert*, 41 N. J. L. 454. A joint purchase of necessities by husband and wife is regarded in law as the contract of the husband alone; and while book entries, charging the goods to them jointly, are presumptive evidence of a sale on his credit, they are not conclusive of that fact. It may nevertheless, under the Pennsylvania Married Woman's Act, be shown that they were purchased by the wife and on her credit. *Rigoney v. Nerinan*, 23 P. F. Smith, 330. But while that act enables the wife to bind her separate estate for necessities, the very essence of her liability is that they were furnished at her request and on her credit. If not so furnished, her separate estate cannot be made liable. *Sawtelle's Appeal*, 3 Norris, 306, 311; *Hoff v. Koerper*, 103 Pa. St. 396. The common-

3. MARRIED WOMEN AS AGENTS OF NECESSITY.

The author of a very popular law work in this country, stating a principle that would render not "voidable" only, but absolutely "void," all the contracts of infants, lunatics, drunkards, and married women, says: "Some of the above authorities certainly seem to be inconsistent with the principle that a person in a state of intoxication has no agreeing mind, and therefore there never was a contract between the parties. *We think this principle, however, the true one.*"¹

The learned author evidently, in that connection, lost sight of the difference between *express* and *implied* contracts, which is well pointed out by Pollock, C. B., thus: "With regard, however, to contracts which it is sought to avoid on the ground of intoxication, there is a distinction between *express* and *implied* contracts. Where the right of action is grounded upon a specific, distinct contract, requiring the assent of both parties, and one of them is incapable of assenting, in such a case there can be no binding contract; but in many cases the law does not require an actual agreement between the parties, but implies a contract from the circumstances; in fact, the law itself makes the contract for the parties. Thus, in actions for money had and received to the plaintiff's use, or money paid by him to the defendant's use, the action may lie against the defendant, even though he may have protested against such a contract. So a tradesman who supplies a drunken man with necessaries, may recover the price of them if the party keeps them when he becomes sober, although a count for goods bargained and sold would fail."²

Where a married woman is compelled, through the misconduct of her husband, to leave him, she is clothed with the power of binding him by her contracts for necessaries. Here is very much less of the "agreeing mind," of which Prof. Parson speaks, than in the cases to which he refers. For not only, in clothing

law rule in regard to the presumed authority of the wife to bind her husband by her contracts for necessaries has been held not to be changed in Minnesota by the statutes relating to the rights and liabilities of married women. *Flynn v. Messenger*, 28 Minn. 208. Hence, it has been held there, where a wife living with her husband employed a servant for ordinary domestic service in their family, her husband was impliedly liable for such services. It is not necessary to show any express authority from the husband to make the contract. This is within the presumed authority of the wife, and in employing

such servant she is presumed to be acting for the husband. *Wagner v. Nagel*, 33 Minn. 348.

¹ 1 Pars. on Con. 434, note *d*.

² *Gore v. Gibson*, 13 M. & W. at p. 625.

In this case both Parke, B., and Alderson, B., make the very common mistake of using the word "void" where they evidently meant only "voidable," and as equivalent to "he cannot be compelled to perform the contract," *i. e.*, without affirming it. See this reflected on by Martin, B., in *Matthews v. Baxter*, L. R. 8 Ex. 133. See *Molton v. Camroux*, 2 Ex. 487, for another instance of such a mistake.

the wife with such a power, is there generally no agreeing mind; but, as a rule, such power is exercised by the wife against the express dissent of her husband. She is clothed with the implied power to bind him as his agent, which arises out of the necessities of the case; and she is, therefore, not infrequently, and very properly, called an Agent of Necessity.¹

The usual cases of agency of necessity are those of married women and ship-masters;² although there are many other instances where such a power springs into existence from the necessities of the case.³

¹ In *Johnson v. Sumner*, 3 H. & N. 261, 265, Pollock, C. B., says: "We have not to interpret a positive law, but to ascertain the principle on which a husband has been held liable for goods furnished to his wife, and see how far, or whether at all, it applies to this case. Now, the principle seems to be merely that of agency; the wife is spoken of as the husband's agent, as having his authority, and the declaration is as upon a contract by him through his wife as an agent. The question then to be resolved is, had the wife authority to pledge the husband's credit. Now, authority may be express or implied, or arising from conduct, as where one person holds out another in such way as to induce a belief of authority; or there may be an *authority from necessity*, as in the case of the captain of a ship under certain circumstances. If a man and his wife live together, it matters not what private agreement they may make, the wife has all usual authorities of a wife. If the husband turns his wife away, it is not unreasonable to say she has an *authority of necessity*; for she by law has no property, and may not be able to earn her living; but we should hesitate to say that if a laboring man turned his wife away, she being capable of earning, and earning as much as he did; or if a man turned his wife away, she having a settlement double his income in amount, the wife in such cases could bind her husband." And see, *per* Lord Ellenborough, in *Liddlow v. Wilmot*, 2 Stark. 86; and *Clifford v. Laton*, 3 C. & P. 15. In *Manby v. Scott*, Sid. 109, it is somewhat quaintly said: "Here the question is, will the contract of a wife for necessaries make her husband liable? For nobody will dispute that usually the contracts of wives are void, as all their power is transferred to the husband by their marriage. This is founded on the necessity of the thing; and our law allows many persons who are otherwise disabled, in cases of necessity to enter into contracts; as an instance, it is a general rule that the contracts of

all infants are void, but, nevertheless, in cases of necessity their contract shall bind them. And that not only *quoad esse*, sed *quoad necessitatem convenientie*. (*Peters v. Fleming*, 6 M. & W. 45; *Burghart v. Hall*, 4 M. & W. 727.) As our law gives all that the wife has to her husband on marriage, if wives shall not be allowed to obtain food and other necessities, wives will be in a worse condition than those who commit treason or felony, for felons shall be allowed from their goods reasonable estovers, to save them from starving. And the statute, Art. Cler., provides that persons who abjure the realm shall have sufficient estovers of their goods. But women cannot enjoy this privilege if they can take nothing without the permission of their husbands, but they will be left to perish, Tantalus-like, from thirst and hunger, amid the overflowing exuberance of their husbands' plenty."

² If the master of a ship contracts for the necessary repairs therefor, this binds the owner, although in that case the master was not obliged to repair the ship. Yet, inasmuch as the repairs were necessary to save the ship from foundering, the law enables him to bind the defendant by his contract. *Bridgman's Case*, Hob. 11; *Manby v. Scott*, Sid. 109.

³ "For when she returned to her husband and he would not receive her, nor provide a maintenance for her, if nobody would trust her so as to charge the husband, she must starve, for she cannot earn her living by her labor, for whatever she gains by her labor the husband shall have, and therefore of necessity she must be trusted, and the things being necessary for her living, the husband ought to be charged for them; and the husband's prohibiting the plaintiffs to trust her, cannot deprive her of the liberty which the law gives her for preservation of her life; for the law for necessity dispenses with things which otherwise are not lawful to be done, as to throw down my neighbor's house for preventing the spreading of fire; to throw goods out of a boat when it is

The law is well established that if, through the misconduct of the husband, his wife is driven from home, the law presumes an authority conferred on her as his agent to contract for her necessary sustenance, and he is liable, even though he may have cautioned tradesmen not to trust her. In *Read v. Legard*,¹ it was decided that when a man contracts marriage with a woman, he thereby becomes, in point of law, liable to maintain her; and if he fail to do so, unless under circumstances which justify him, she has authority to pledge his credit; the true principle being that when a man marries, he contracts an obligation to support his wife, and in point of law he gives her authority to pledge his credit for her support, if circumstances render it necessary, she, herself, not being in fault. By the marriage contract, the parties contract a relation which gives the wife certain rights which the law recognizes. One of them is that the wife is entitled to be supported according to the estate and condition of her husband. If she is compelled by his misconduct to procure the necessary articles for herself, as, for instance, if he drives her from his house, or brings improper persons into it, so that no respectable woman could live there, according to the decided cases he gives her authority to pledge his credit for her necessary maintenance elsewhere; which means that the law gives that authority by force of the relation of husband and wife.²

And if a wife quits her husband's house under a fair apprehension of personal violence, or because he brought a disreputable

overladen, and the like." *Manby v. Scott*, 1 Lev. 4. Closely analogous in principle, as derived from the same necessity, is the way of necessity, with reference to which it has been held that if a way is claimed and enjoyed as one of necessity, and the way previously in use shall be obstructed without the fault of the owner of it, by flood, for instance, he may, if necessary, pass over other lands of the owner of the soil, doing no unnecessary damage thereby. *Wash. on Ease*, 197; *Leonard v. Leonard*, 2 Allen, 543; *Farnum v. Platt*, 8 Pick. 339; *Holmes v. Seely*, 19 Wend. 507; *Taylor v. Whitehead*, 2 Doug. 749; *Capers v. McKee*, 1 Strobh. 163; *Henn's Case*, W. Jones, 296. And where a public way becomes impassable, by being overflowed or out of repair, the necessity will justify a traveller in removing enough of the fences of the adjoining close to enable him to pass around the obstruction, doing no unnecessary injury. *Wash. on Ease*, 196; *Taylor v. Whitehead*, 2 Doug. 745; *Campbell v. Race*, 7 Cush. 408; *Bullard v. Harrison*, 4 Mau. & S. 387; *Holmes v. Seely*, 19 Wend. 507; *State v. Northumberland*, 44 N. H. 631;

Williams v. Safford, 7 Barb. 309. In a later part of this work (*post*, Book II., Part IV.) we treat of ship-masters as agents of necessity.

¹ 6 Ex. 636.

² *Per* Alderson, B., in *Read v. Legard*, 6 Ex. at p. 642. If the husband turns his wife away, it is not unreasonable to say she has an authority of necessity; for she by law has no property, and may not be able to earn her living. *Johnston v. Sumner*, 3 H. & N. 261; *Evans v. Fisher*, 5 Gilm. 569; *Snorer v. Blair*, 1 Dutch. 94; *Norton v. Rhodes*, 18 Barb. 100; *Zeigler v. David*, 23 Ala. 127; *Clement v. Mattison*, 3 Rich. L. 93; *Mayhew v. Thair*, 8 Gray, 172; *Emery v. Emery*, 1 Y. & J. 501; 6 Price, 336; *Horwood v. Heffer*, 3 Taunt. 421; *Baker v. Sampson*, 14 C. B. N. s. 383; *Williams v. Fowler*, *McClell. & Y.* 269; *Turner v. Rooks*, 10 A. & E. 47; *Brown v. Ackroyd*, 5 El. & Bl. 819; *Johnston v. Manning*, 12 Ir. C. L. R. 148; *Forristall v. Lawson*, 34 L. T. 903; *Harris v. Morris*, 4 Esp. 41; *Harrison v. Grady*, 12 Jur. N. s. 140; 13 L. T. 369.

woman to reside in it, that is equivalent to her husband's turning her out of doors ;¹ as is also the reasonable apprehension on the part of a wife of being placed under improper restraint ;² or of being actually restrained improperly in a madhouse.³

If the husband has turned the wife out of doors, and does not give her adequate means of subsistence, according to his degree in life and his fortune, the law makes her his agent to order such things as are reasonable and necessary for herself, but it gives her no liberty to go into any extravagance, or to pledge his credit for anything beyond what would be reasonable and necessary for her subsistence. If she be living in open adultery, her husband is not bound by any contract which she may make even for necessaries. If the husband has not turned the wife out of doors, and they have separated in consequence of domestic differences, and they do not live together, another consideration arises, which is this : Has the husband given the wife sufficient for necessaries suitable to his degree ? For if he has he is not liable for her debts, even for necessaries ; for if the wife has from her husband wherewithal to provide herself with necessaries, she cannot go as her husband's agent and bind him even for necessaries.⁴

If a married woman be living separate and apart from her husband, it is the duty of tradesmen to inquire under what circumstances the separation took place, before they part with their goods ; and if a tradesman do part with his goods to a woman living apart from her husband, the *onus* lies on him to prove that the separation took place under such circumstances as will entitle him to recover the price of those goods against the husband. If a tradesman will trust any woman that comes into his shop, he must do so at his peril.⁵

If a husband improperly compels his wife to leave his house, he thereby gives her power to pledge his credit for necessaries ; but if she goes away without his consent and against his will, a tradesman giving her credit does so at his peril.⁶

Where the separation is voluntary on both sides, the husband is liable unless he has made sufficient provision for her maintenance.⁷

¹ *Houlston v. Smyth*, 3 Bing. 127.

² *Tempany v. Hakewill*, 1 F. & F. 438.

³ *Houlston v. Smyth*, 3 Bing. 127.

⁴ *Per* Ld. Abinger, in *Emmett v. Norton*, 8 C. & P. 506.

⁵ *Clifford v. Laton*, 3 C. & P. 15. And see *Montague v. Espinasse*, 1 C. & P. 356 ; *Montague v. Baron*, 5 D. & R. 532 ; *Houlston v. Smith*, 2 C. & P. 22 ; *Mainwaring v. Leslie*, 2 C. & P. 507 ; *Hindley v. Marquis of Westmeath*, 6 B. & C. 200 ; *Waithman v. Wakefield*, 1 Camp. 120 ;

Metcalfe v. Shaw, 3 Camp. 22 ; *Bentley v. Griffin*, 5 Taunt. 356 ; *Etherington v. Parrott*, Ld. Raym. 1006 ; 1 Salk. 118.

⁶ *Hindley v. The Marquis of Westmeath*, 6 B. & C. 213, *per* Bayley, J.

⁷ *Hindley v. The Marquis of Westmeath*, 6 B. & C. 215 ; *per* Little Dale, J. ; *Allen v. Aldricks*, 9 Foster, 63 ; *Fredd v. Eves*, 4 Harring. 385 ; *Calkins v. Lang*, 22 Barb. 97 ; *Cary v. Patton*, 2 Ashm. 140.

One or two of the American cases intimate that the *onus* of proof is on the husband to show that he has made such sufficient provision,¹ but we think the law is as stated in the English cases.²

And a husband is not bound to give notice to a tradesman with whom he has dealt for ready money during his cohabitation with his wife, of his separation from her, and the consequent revocation of her ordinary authority to bind him by her contract for necessaries. If he had during the cohabitation authorized her to deal with the tradesman on credit, he would have been bound to give notice of the revocation of that authority on the separation.³

And where the wife is living separate from her husband, and he makes her an adequate allowance for her support, he is not liable for her debts.⁴

Where a wife abandons her husband without just cause, he is no longer liable for her maintenance or for medicine, or medical aid furnished to her. And where a physician who furnished medicine and medical aid to a wife who had previously abandoned her husband, afterwards sues the husband for such medicine and medical aid, it devolves upon the plaintiff to show affirmatively that the abandonment was for a sufficient cause.⁵ In order to bind the husband for goods sold the wife after notice to cease furnishing, the seller must show not only that they are necessaries, but that the husband has failed to make an adequate supply.⁶

And one who has received into his house a woman and her child who have been forced to leave their home through the cruelty of the woman's husband, cannot recover from the husband for their maintenance, if one of his motives for receiving the woman was that he might maintain an adulterous intercourse with her.⁷

¹ See *Frost v. Willis*, 13 Vt. 202; *Rumney v. Keyes*, 7 N. H. 571.

² See *Mitchell v. Treanor*, 11 Ga. 324, following the English cases, *Holt v. Brien*, 4 B. & Ald. 252; *Montague v. Benedict*, 3 B. & C. 631; *Montague v. Baron*, 5 D. & R. 532; *Harvey v. Norton*, 4 Jur. 42; *Freestone v. Butcher*, 9 C. & P. 647; *Metcalf v. Shaw*, 3 Camp. 22; *Bentley v. Griffin*, 5 Taunt. 356. See also, *Johnston v. Sumner*, 3 H. & N. 261; *Edwards v. Towels*, 6 Scott N. R. 641; 5 M. & G. 624.

³ *Wallis v. Biddick*, 22 W. R. 76. See *Jolly v. Rees*, 16 C. B. x. s. 628; *Renear v. Teakle*, 8 Ex. 680; *Phillipson v. Hyter*, L. R. 6 C. P. 38; *Johnston v. Sumner*, 3 H. & N. 261.

⁴ *Hodgkinson v. Fletcher*, 4 Camp. 70; *Mizen v. Pick*, 3 M. & W. 481; *Rawlins v. Vandyke*, 3 Esp. 250; *Reeve v. Conyng-*

ham, 2 C. & K. 444; *Holder v. Cape*, 2 C. & K. 437; *Billin v. Bignell*, 7 H. & N. 877; *Mallalieu v. Lyon*, 1 F. & F. 431; *Eastland v. Burchell*, 3 Q. B. D. 290.

⁵ *Hartmann v. Tegart*, 12 Kans. 177.

⁶ *Barr v. Armstrong*, 56 Mo. 577.

⁷ *Almy v. Wilcox*, 110 Mass. 443.

With the exception stated above, where some of the American cases (improperly we think) place the burden on the husband of showing that he has provided necessaries for his wife, who has left him without her fault, and is living separate from him; the mass of the cases in this country are in perfect accord with those in England on the subject of the husband's liabilities for the wife's contracts for necessaries under such circumstances. We examine some additional cases. Thus in *Billing v. Pilcher*, 7 B. Mon. (Ky.) 458,

There is a case in the Supreme Court of the Province of New Brunswick ¹ on the question of a married woman as an "agent of

Marshall, C. J., of the Kentucky Court of Appeals, well lays down the law. This was a case where a married woman commenced proceedings for a divorce, which, after bill and answer filed, were stayed, at her instance, on being reconciled to her husband. An action was brought against the husband by the wife's attorney, for the expenses in filing the bill. The defendant proved that his wife had no cause for bringing the suit. Under the directions of the judge of the Circuit Court, that if the bill was filed in good faith on the wife's representations, the plaintiff was entitled to recover against the husband, the jury found for the plaintiff. On error, the judgment below was reversed. The law, as laid down by Chief Justice Marshall, is applicable to the whole subject. He says: "It is well settled that a wife who is wrongfully turned out of doors by her husband, or from ill treatment is obliged, by a regard to her own safety, to leave his house, carries with her an implied credit, or an implied authority to charge him for necessities, which, as a wrong-doer, he shall not be permitted to repel. The principle is, that being bound to support and protect his wife, he cannot relieve himself from this obligation by his own wrongful act; but that if by his own improper conduct towards her, he drives her to seek support and protection from others, or justifies her in so doing, the law, still holding him to his duty under the new circumstances which he has brought about, implies an authority from him to any one who may furnish at his charge the necessary supplies or assistance, or an authority from him to his wife to procure them upon his credit. But the essential basis of this implication is that the husband shall have wrongfully produced, or shall at least have assented to the separation which has rendered it necessary that the wife should receive from others the supplies or assistance which are essential to her support or protection. Hence it is laid down that if a tradesman deal with a wife separated from her husband, it is incumbent on him to make inquiry; that he trusts her at his peril, and that, if he would make the husband responsible for the articles furnished, he must prove that the separation occurred under such circumstances as will render the husband *prima facie* liable. The same principles apply to the case of legal assistance furnished to the wife. If the conduct of the husband towards her makes it

necessary that she should apply to the law for securing either protection or support, or if it be such as justifies her in so doing, the husband will be chargeable for the expenses thus rendered necessary by his own improper conduct. We have seen no case and perceive no sound principle which sanctions the doctrine that the authority of the wife to bind her husband, or the rights of others who deal with her or render assistance, to charge her husband, may be established either by the mere representations of the wife, or by the credit which those representations may gain with the persons to whom she appeals. The authority rests not upon the representations of the wife, nor upon the credit given to them, but upon the evidence of the facts upon which the law gives the authority. In case of separation, good faith requires that those who deal with the wife, intending to charge the husband, should inquire from other sources, whether the circumstances will authorize them to charge him. And if they trust to the mere representations of the wife, they do it at their peril." See *Shepherd v. McKone*, 3 Camp. 326. And where the husband consents to his wife living apart from him, he is as liable for necessities furnished her, on his credit, as though they were living together. *Frost v. Willis*, 13 Vt. 202. And in *Hall v. Weir*, 83 Mass. 261, it was held that where the husband, without legal and sufficient cause, deserts his wife and furnishes no adequate means for her support, the wife has an implied authority derived from the legal duty of the husband to make suitable provision for her and her children, to act as his agent, and procure such supplies as might be necessary on his credit; and the question as to whether the articles sold and delivered are such as are actually necessary and proper under the circumstances of the particular case, is properly left to the jury. And where the defendant's wife left him, and obtained a divorce from him for cruelty, a suit for her board down to the time of obtaining the decree, was sustained against him. *Hancock v. Merriek*, 64 Mass. 41.

So, if the husband introduces a woman of profligate habits into his house, and permits her to remain there as an inmate, his wife will be justified in withdrawing from his protection, and he will be liable for necessities furnished her. The law requires the husband to supply his wife with necessities, such as meat,

¹ *Bennett v. Jones*, 4 Allen, N. B. R. 397.

necessity," which is of sufficient value to justify very full reference to it. It is a case where the defendant turned away his wife with-

drink, clothes, medicines, etc., suitable to his degree and circumstances; and if he by his treatment shall render her situation unsafe, or their home unfit for a modest and chaste woman to remain in, he sends her from home as effectually as if he turned her out of doors without cause, and under such circumstances he gives her a general credit for necessities, for which he will be liable to any one furnishing them. *Descelles v. Kadmus*, 8 Iowa, 51. In *Mott v. Comstock*, 8 Wend. 544, the defendant, who was living apart from his wife, claimed that he supplied his wife with necessities suitable to her condition; and the court held, that as he professed to provide for her, it was incumbent upon a party who had been expressly forbidden to give credit to a wife, in order to render the husband liable for subsequent supplies, to show affirmatively and clearly that the husband did not supply her with necessities suitable to her condition. For cases where, under the application of these and analogous principles, the husband has been liable, and not liable, respectively, under the circumstances, for necessities furnished his wife living apart from him, see *Wray v. Cox*, 24 Ala. 337; *Black v. Bryan*, 18 Tex. 453; *Ferren v. Moore*, 59 N. H. 106; *Minck v. Martin*, 54 N. Y. 136; *Lord v. Thompson*, 41 N. Y. Super. Ct. 115; *Sykes v. Halstead*, 1 Sandf. 483; *Eiler v. Crull*, 99 Ind. 375; *Watkins v. De Armond*, 89 Ind. 553; *Litson v. Brown*, 26 Ind. 489; *Lockwood v. Thomas*, 12 Johns. 348; *Horner v. Lewis*, 10 Johns. 38; *Shelthan v. Gregory*, 2 Wend. 422; *Tebbetts v. Hapgood*, 34 N. H. 420; *Pidgin v. Cram*, 8 N. H. 351; *Allen v. Aldrich*, 9 Fost. 73; *Rutherford v. Coxe*, 11 Mo. 347; *Cany v. Patton*, 2 Ashm. (Pa.) 140; *Reed v. Reed*, 52 Mich. 117; *Collins v. Mitchell*, 5 Harr. (Del.) 369; *Kemp v. Downham*, *Id.* 417; *Hall v. David*, 23 Ala. 127; *Sturtevant v. Starin*, 19 Wis. 268; *Brown v. Patton*, 3 Humph. (Tenn.) 135; *Porter v. Bobb*, 25 Mo. 36; *Harshaw v. Meryman*, 18 Mo. 118; *Fred v. Eves*, 4 Harr. 385; *Kinball v. Keyes*, 11 Wend. 34. See also *Mainwaring v. Leslie*, 2 C. & P. 507; *Hindley v. Westmeath*, 6 B. & C. 200. But see *Rumney v. Keyes*, 7 N. H. 571, where, contrary to the general holding, and to what we think is the law in the case, it was held that proof of the marriage, and that the articles were necessities suitable to the condition of the husband in life, is *prima facie* evidence of the husband's liability, and it rests upon him to rebut the presumption in law arising from the obligation of such relation

and expenditures. This is ordinarily the law when a wife is living with her husband. But when she is living separate from him, a different rule applies: and, in accordance with the English and the mass of the American authorities, we think that any one trusting the wife does so "at his own peril," and that the burden of proof is cast on him to show both the non-fault of the wife in leaving her husband, and that the articles supplied her are necessities, to the full extent of their being suitable as to degree, and as to their not being supplied by the husband.

The rule at common law is, that where the husband abandons the wife and leaves the country, or where he is banished, even for a limited time, the disabilities of coverture under which the wife labors are so far removed as to enable her to be contracted with, to sue and be sued, and to acquire, hold, and dispose of property. *Gregory v. Paul*, 15 Mass. 32; *Starrett v. Wynn*, 17 S. & R. 132. On the principle of these cases, it has been held in Texas that when the husband abandons the wife and fails to provide for the family, this authorizes the wife to manage, control, and dispose of the common property, so as to secure a support for herself and children. *Heidenhimer v. Thomas*, 5 Tex. Law Rev. 205; *Fullerton v. Doyle*, 18 Tex. 13; *Cheek v. Bellows*, 17 Tex. 613; *Wright v. Hays*, 10 Tex. 130. And the conviction, sentence, and confinement of the husband in the penitentiary, rendering it impossible for him to manage and control the common property, or to aid in supporting his wife and children, is equivalent to and is considered such an abandonment of his wife as would authorize her to manage, control, and dispose of the common property in securing a support for herself and children. *Slater v. Neal*, 64 Tex. 222.

As the decisions, both English and American, are virtually uniform, that, where a married woman is living separate and apart from her husband, parties supplying her even with necessities do so at their peril, and can only hold the husband for the price of such necessities when the wife is not in fault, and when the husband has not himself supplied the necessities, there would seem to be no question that the *onus probandi* on both these points—namely, the non-fault of the wife, and the non-supply of the necessities by the husband—is on the party supplying the goods. The very fact that he can only recover for necessities would cover the latter point, which is the one controverted, as we have intimated, by

out cause, and afterwards offered to take her back and provide for her, but she refused to return. The jury were directed that this offer did not relieve the defendant from liability to a third person who had afterwards supplied the wife with necessaries. This was held by the majority of the court (with which holding we entirely concur) a misdirection; and that the question for the jury should have been, whether the defendant made a *bonâ fide* request to his wife to return, and if so, whether she had refused on a well-grounded belief that his ill treatment of her would be renewed. And, *semble*, that the liability of the husband depends upon the implied authority, in such a case, of the wife as his agent from necessity, to bind him; and that when, in such a case, the necessity ceases, her right to bind him ceases also.

We consider the question of sufficient importance to warrant us in setting out the judgment of the majority of the court in full; as we think, notwithstanding the generally incorrect doctrine of the text-books on the subject, the judgment is so unquestionably sound as to admit of no doubt whatever of the correctness of the general doctrine which it sustains. The judgment is that of Ritchie, J., concurred in by two of the other three judges of the court.¹

one or two of the American cases. See *Rumney v. Keyes*, 7 N. H. 571, and, not so distinctly, *Frost v. Willis*, 13 Vt. 202. But all the English and nearly all the American cases (see the English cases cited in this note on the point; and, among the American cases cited in this note, see *Mitchell v. Treanor*, 11 Ga. 324; *Barr v. Armstrong*, 56 Mo. 577; *Hartmann v. Tegart*, 12 Kans. 177; and the cases cited *Ibid.*, 182) support the view we have taken; and we see nothing in the one or two exceptional American cases to which we have referred to cause us to question its correctness. Like any other case of agency, the facts constituting the party (wife in this case) the agent must be shown. And as the wife separated from her husband does not, *prima facie*, carry this agency with her, the only way that it can be shown is by proving all the facts necessary to constitute it; these being the two, as above stated. To the objection that this places on the plaintiff the burden of proving a negative, the answer is (1), that he supplies the necessities at his peril, and can only recover for the goods by showing that they are necessaries, which involves the proof of both of the facts named; and (2) there is no greater burden placed on him than there is, for instance, in an action for malicious arrest, where the plaintiff must not only prove the malice, but the negative involved in the action, — that the arrest

was without reasonable and probable cause. In many cases that arise the question is an important one, which is our reason for dwelling on it thus fully.

¹ "I think," says Ritchie, J., delivering the judgment of the majority of the court, "there is a fallacy in the plaintiff's argument, and in the decision on which he mainly relies, viz., *Emery v. Emery*, 1 Y. & J. 506 (I shall hereafter more particularly refer to this case); and that it arises from mixing up the jurisdiction of the spiritual court with the consideration of the case in this court, which, with great deference, I think will be found, on a careful consideration of the principles which should govern the case, to have no bearing whatever; that it is simply governed by the principles of the common law, and is matter of contract, with which this court is specially competent, and is now called upon, to deal, without reference to the peculiar jurisdiction, principles, or modes of proceeding of the spiritual or any other court. My proposition is, that the right to maintain this action is not based on, or affected by, what a spiritual court might or might not do, if a case for restitution of conjugal rights between the husband and wife was before it, though growing out of the same circumstances; but on a contract between the plaintiff and the defendant, made by the wife on behalf of the husband, by virtue of an authority in law, whereby she

The case of *Tempany v. Hakewill*,¹ although it is not clear that the case itself is quite as wide an authority as it is quoted for by

is authorized from necessity to contract on her husband's behalf. The principles which govern actions of this kind are clearly enunciated in the case of *Johnston v. Sumner*, 4 Jur. N. S. 462; 3 H. & N. 261, in which Pollock, C. B., delivering the judgment of the court, says: 'On the present occasion we have not to interpret a positive law, but to ascertain the principle on which a husband has been held liable for goods furnished to his wife, and see how far, or whether at all, it applies to this case. The principle seems to be merely that of agency; the wife is spoken of as the husband's agent, as having his authority; and the declaration is as upon a contract by him through his wife as an agent. The question to be resolved, then, is, had the wife authority to pledge the husband's credit?' The very question before us in this case. After remarking that that authority may be express, implied, or from necessity, the learned chief baron proceeds: 'If the husband turns his wife away, it is not unreasonable to say she had an authority of necessity; for she by law has no property, and may not be able to earn her living; but we should hesitate to say that if a laboring man turned his wife away, she being capable of earning, and earning as much as he did, or if a man turned his wife away, she having a settlement double his income in amount, the wife in such cases could bind the husband.' And, again: 'The burden of proof is on the person who has trusted the wife. . . . We think an authority must be shown, and shown in one or other of the ways we have mentioned. This rule puts the burthen of proof on the right person. It gives the husband that to which he is fairly entitled, viz., to have the authority affirmatively shown; consequently involving the showing of the wife's wants, including her allowance or other means. . . . We think, therefore, authority must be shown in all cases where the husband is sought to be made liable for his wife.' If, then, the principle involved is nothing more nor less than simple agency, and such agency constituted, in a case like the present, by necessity alone, if you remove the necessity, is not the authority and agency likewise removed? Must there not, to sustain a continuing agency, be a continuing necessity? When the necessity ceases, what supports the authority? If in this case the husband did wrong (as most certainly he did) and turned the wife out of

doors, and thereby, of necessity, clothed her with authority to contract in his name, because he sent her abroad without the means of support, is there no *locus penitentie* for him? Is it, as between him and the plaintiff or person supplying the wife, an authority at law irrevocable? I can find no principle to sustain such a doctrine. The present was certainly a very premeditated, gross case of misconduct on the part of the husband. But try the principle out on a case not aggravated in its circumstances. Take the case of a man with several young children, who, in a moment of irritation, produced perhaps by tantalizing conduct on the part of the wife, closes his door against her, but without any circumstances of indecency or personal violence, and thereby, of necessity, gives her the authority spoken of. In a few weeks, heartily repenting of his misconduct, he tenders her *bonâ fide* expressions of deep contrition, with a full apology and kind invitation to return to her family and to his bed and board, where ample provision would be found for her comfort and support. She, ill-advised (perhaps by the very person seeking to charge the husband with the board, and whose interest it was to keep them separate), refuses. After such an offer, the *bonâ fides* of which could not be doubted, could any one say she remained from necessity apart from her husband, and that he had not provided reasonable and proper means, in a proper place, for her maintenance? The question being one of authority, would the creditor showing these facts have made out affirmatively, in the concluding language of C. B. Pollock, in *Johnston v. Sumner* (*supra*), 'that the wife, living separate, did so under circumstances from which an authority might be implied;' and this in face of the fact that she could at any moment have returned to her home, and ought to have done so? Take what may perhaps be considered as the converse of this case. The wife leaves her husband of her own accord, without reasonable cause. Having no authority, she could enter into no contract to bind her husband. After a time she offers to return, but the husband refuses to receive her. It seems assumed in the cases that from the time of such refusal a liability arises. Chief Justice Raymond, in *Child v. Hardynan*, 2 Str. 875, says: 'If a woman elopes from her husband, though she does not go away with an adulterer, or in

¹ 1 F. & F. 438.

Ritchie, J., in *Bennett v. Jones*,¹ is, although a *nisi prius* case, worthy of being set out fully in this connection. It was an action

an adulterous manner, the tradesman trusts her at his peril, and the husband is not bound. Indeed, if he refuses to receive her again, from that time it may be an answer to the elopement.' Chancellor Kent, in the second volume of his Commentaries, p. 147, quoting these words, says: 'Lord Eldon subscribed to that case, and the same doctrine has been declared in *New York*.' He cites *McGahay v. Williams*, 12 Johns. 293, and *McCutchen v. McGahay*, 11 Johns. 281. If this is so, what becomes of the case of *Emery v. Emery*? Why would not the principles of that case equally apply? Why should not the husband be permitted to say,—as the leaving was the wife's own wrongful act,—no legal obligation exists at law, till she obtains a restitution of conjugal rights by a decision of a spiritual court?

"The first duty of a husband is to provide for his wife, in his family. While willing to provide her a home and all reasonable necessities there, I cannot understand on what principle he is bound to furnish them elsewhere. When he turns her out without a cause, he does so wrongfully, and clothes her with authority. When he opens his door to her, makes provision for her, and requests her to return to her home and family, and she, having no fear of ill-treatment or want of care, refuses to enter, does she not then become the wrong-doer? Is she not then living apart from her husband, without compulsion; without fear; without his consent, and, consequently, without cause? And if so, is not her conduct in direct violation of her marriage vow? And is not her remaining away under such circumstances, not only contrary to her duty, but tantamount to a voluntary departure? And upon such facts being brought to the notice of a third person, on application by her for assistance on her husband's credit, instead of supplying her with necessities at his expense, and thereby practically encouraging her to continue apart from her family, should not his reply be,—'I can't make you the advances you ask on your husband's credit. You have not his authority, because you are really not in want, he having made proper provision for you in the proper place; there being no impediment to your return to your own home, but your own obstinacy or self-will, and, therefore, no necessity to create an agency?' Or, in the language of *Bac. Ab. Vol. i.*, p. 721, — 'As the husband's liability is

grounded on an implied authority to the wife to contract the debt, it is removed when the circumstances rebut the presumption of such an authority.' Or, if he chooses to take the contrary course and make her advances, ought he not to do so at his peril? And who, I think it may be fairly asked, is injured or aggrieved by such a view of the legal rights and duties of the parties, or what principles does it impugn? On the other hand, is not the contrary at variance with a well-recognized principle of public policy governing the marriage contract; and if it does not directly infringe the Divine command against putting asunder those whom God hath joined together, does it not indirectly do so by assisting to keep them asunder? Is it not discouraging, rather than encouraging, a re-union? Is it not, in fact, establishing a divorce *a mensâ et thoro*, which has never been pronounced, and which a court of law has no power to grant? We find it well established, that though the law allows provision to be made for a separation already determined on, it will not sanction any, the most solemn, agreement, the effect of which is to provide for the contingency of a future separation at the pleasure of the parties? Why? Because this has a tendency to promote that event, contrary to the policy of the law.' 2 Steph. Com. 310: *Durant v. Titley*, 7 Price, 577; *Hindley v. Marquis of Westmeath*, 6 B. & C. 200.

"These impressions have not been adopted without a careful consideration of the case of *Emery v. Emery*, 1 Y. & J. 501, — an authority certainly opposed to the views now expressed, — an authority, in itself, to my mind, very unsatisfactory. It was really only the decision of two judges out of four; the chief baron not concurring in it, and, though he had not sufficiently investigated the case to give a directly contrary decision, he expressed such doubts as, I think, show that, though he was unable fully to make up his mind, his impressions were against the judgment delivered. The fourth judge (*Vaughan, B.*) did not hear the argument, and, on that account, though expressing the strong impression on his mind in favor of the decision, abstained from entering into the grounds upon which that opinion was formed. Barons Garrow and Hullock, who decided the cause, do not appear to treat the question as one of contract at all, but, rather, as a question of jurisdiction between the spiritual and common-

¹ 4 Allen, N. B. R. p. 397. See *post*, p. 169 n.

for board and lodging supplied to the defendant's wife in June, 1858. The pleas were never indebted, and an order for protection

law courts. But I can see no conflict of jurisdiction, nor any practical difficulty likely to arise. Supposing the two courts take the same view of the facts; all well. Suppose they should differ in the conclusion they arrive at; all that can be said is, that another court competent to deal with the facts for the purpose for which they were presented, took another view of them. Suppose a jury, in an action for *crim. con.*, should not be satisfied that the offence was proved, they would find for the defendant, and the court of common law would give judgment accordingly. But, the same facts might be submitted to the court of marriage and divorce, and it might think the charge of adultery fully sustained, and pronounce a divorce. Here would be two courts differing on the same facts, on, substantially, the same issue. But where is it propounded that the court of common law would hesitate to deal with the case before it, or be influenced in any way by what a court of marriage and divorce might or might not do? And, certainly, there is nothing like the conflict that arises in the same court in England, under the recent decisions, which allow the confession of a wife to be evidence against her of adultery, but refuse to receive it against the alleged adulterer,* though a co-respondent; making the court in the same suit, and in the same breath, say, as to A., 'A. and B. committed adultery together,' and as to B., 'A. and B. did not commit adultery together.'

"There is one position of Garrow, B., in which I heartily concur. After stating a possible conflict between the spiritual court and a court of common law he says: 'In this state of difficulty the strong im-

pression on my mind, and which, upon consideration, I have been unable to remove, is that if a husband drives his wife from home by his misconduct, and sends her forth with an implied credit arising from their relative relations, it is his duty by some positive act to determine that liability.' This is just as I would put the law. The husband's conduct and offer should be clear, distinct, unequivocal, — perhaps unconditional, — certainly without any improper or questionable conditions. But the actual decision in that case goes much further. It not only requires the liability to be put an end to by a positive act, but by a positive judicial act, for which, I humbly think, there is neither authority nor principle. I cannot find that this authority has been recognized or acted on in any subsequent case, nor do I see that it has been impeached. The only case that I have seen where the point has been mentioned is *Tempany v. Hakewill*,† and the only report of that is a newspaper one in the *Times* of Feb. 9, 1859. Mr. Baron Channell, in summing up, is reported to have said, after stating what would justify a wife in leaving her home, and what would clothe her with her husband's credit. 'If under these circumstances she left her home, she was clothed with her husband's credit, and he would be liable for all necessities which were supplied her. She would also be justified in remaining away if, after the lapse of time, her husband requested her to return, provided she had a well-grounded belief that the indignities or cruelties would be renewed on her return.' If this is an accurate report of what the learned judge said, it is adverse to the case of *Emery v. Emery*. But the decision not

* There is nothing by any means exceptional in this. A confession, while evidence against the person making it, is, of course, no evidence whatever against another alleged to be guilty of the same offence. An estoppel arising from the admissions of A. does not estop B., though A. in his admissions may allege that B.'s acts were the same as those of A. In these cases, like that named by the learned judge, it is simply a matter of evidence, and not a conflict in decision at all. A better instance of such conflict would be, as in the case of *Venning v. Hunter*, in the Province of New Brunswick (not regularly reported), where the spiritual court refused a divorce in *Hunter v. Hunter*, but where, notwithstanding the decree to this effect, it was

held by Ritchie (then C. J.) himself, following the principles laid down in *Bennett v. Jones*, that Hunter's wife, being driven from her home by her husband's cruelty, became thereby his agent by necessity, and had the right to pledge his credit for her support. This is a better illustration of the point in the principal case than the one put. Here, on the same facts, the spiritual court refused to decree a separation, and the common-law court sustained the separation; compelling, by its decision, the husband to do what was necessary for its continuance; and there is no question as to the correctness of the decision in either of the cases.

† This case is reported in 1 F. & F. 438. See *ante*, p. 167.

under the English Divorce Act of 20 Vic. The facts were that the defendant and his wife separated in 1851, he making her an allowance. She returned to his house in 1852, and, as she alleged, was expelled. He then provided her a residence, which she left. In 1854 she was put into a lunatic asylum, with the concurrence of her father, whence she escaped in 1855. In 1856 she obtained a decree for restitution of conjugal rights, and her husband provided for her a residence in the upper part of which he himself lived; but the whole of which, except a single room on the ground floor (which she occupied), was divided from the latter by a screen door. There was evidence as to apprehension on her part of his intention to confine her as a lunatic, and, having left the house, she obtained the protecting order under the act (the effect of which is to make her liable as a *feme sole* for her contracts, etc., and to exempt her husband from such liability), and she went to reside in the house of the plaintiff. The action was brought for her subsequent board. She lived under a feigned name, and, both before and after her going to the plaintiff, the defendant had searched for her without effect, and he swore that he had always desired to find her in order to make a provision for her. The plaintiff had made no inquiries.

The order under the act having been produced, and the necessary evidence having been given with reference to it, the judge, Channell, B., after having consulted other judges, was prepared to direct a nonsuit, on the ground that the protecting order barred the action. Counsel for the plaintiff, however, pressing to be allowed to go to the jury, and the counsel for the defendant assenting, the learned judge in summing up said:—

“There are many things which would justify a wife in leaving her home, such as being exposed to indignity by her husband; bringing into the house a kept mistress, or cruelty. If, under these circumstances she has left her home, she was clothed with her husband’s credit, and he will be liable for all necessaries which were supplied her. She would also be justified in remaining away, if, after the lapse of time her husband requested her to return, provided she had a well-grounded belief that the indigni-

having appeared in a recognized report I have not allowed it to influence my mind.

“The result, then, of my present judgment is that the learned judge should have submitted to the jury the question whether the defendant did or did not make his wife a *bona fide* request to return, receive support, and live with him; and, if so, whether she refused on any well-grounded belief that indignities or cruelties would be renewed upon her return.

And they should have been told that if she did she was justified in remaining away. But if the offer was clear, distinct, positive, and *bona fide*, and she had no reasonable grounds for believing she would be subjected to further ill-treatment, she was bound to return; and, if she did not, the right to pledge her husband’s credit ceased. I therefore think the rule should be made absolute for a new trial.” Rule absolute for a new trial accordingly.

ties or cruelties would be renewed upon her return.¹ But when a wife is living with her husband, and she leaves him without just cause, then she has no right to pledge her husband's credit. Any person who supplies a married woman living apart from her husband with goods, must do so at his own peril, and must make out the authority of the wife to pledge her husband's credit, to enable him to recover. It is important in the present case to observe the conduct of Mrs. Hakewill previous to the lunacy, because if you find that before that period she had endeavored to live separate from her husband, that will throw considerable light upon her subsequent proceedings. The plaintiff proved nothing with respect to the point of authority, and the only evidence with regard to that was the statement of Mrs. Hakewill, contradicted by the testimony of her husband, who was corroborated by several witnesses. The plaintiff admitted that he had made no inquiries respecting Mr. Hakewill, or the terms upon which his wife was living apart from him, and, although he was not bound by law, or even by common honesty, to make such inquiries, yet if he was so indiscreet as to supply goods without doing so, he must take the consequences, unless he can make out the necessary facts which would render the husband liable. He has not done so if you believe that the husband provided a home for the wife, unless you think that she left it under a reasonable dread of unlawful confinement as an alleged lunatic."

The jury found a verdict for the defendant.

A learned author on Marriage and Divorce² says: "If the wife was justified in leaving the husband on account of his misconduct, a notice to her to return will be of no avail to abridge the credit." The only authority cited for this proposition is that of *Emery v. Emery*.³

The case of *Emery v. Emery*,⁴ is to our mind eminently unsatisfactory and unsound; and we very much doubt if it would be followed in this country or in England. As we have pointed out, it has been expressly repudiated in the province of New Brunswick.⁵

¹ This is exactly the language quoted from the *Times* by Ritchie, J., in *Bennett v. Jones*. This proposition is the converse of the holding in *Bennett v. Jones*, but it is obvious that it was quite within the meaning of Channell, B., that the wife would *not* be justified in remaining away from her husband if after the lapse of time he requested her to return; provided she had a well-grounded belief that the indignities or cruelties would *not* be renewed upon her return. The case may therefore be fairly considered as sustaining the propositions laid down in *Bennett v. Jones*; the correctness of the law as laid down in both

of these cases being on principle unquestionably correct.

² Bishop, vol. i. § 572. The other text-writers make the same mistake. See citations, *infra*.

³ 1 Y. & J. 501. It is also cited by Bishop, and in some of the American cases, as reported in 6 Price, 336; but that (also *Emery v. Emery*) is an entirely different case, not on the question at all, and decided some eight years prior to the decision of the case in *Young & Jervis*.

⁴ 1 Y. & J. 501.

⁵ In *Bennett v. Jones*, 4 Allen, N. B. R. 397, fully stated, *ante*, p. 164 *et seq.*, and note to p. 166.

As the question involved in it is one of considerable importance we shall examine it fully.

The marginal notes of the case are: "What will justify a wife in leaving her husband? Where circumstances justify a wife in leaving her husband, a request on his part that she should return to his protection will not determine his liability for necessities supplied to her during the separation. Alexander, L. C. B., *dubitante*." It may be that, from the facts in the case, these marginal notes furnish a correct statement of what the case really holds. If so, we would not be prepared to dissent from such a proposition, that *a mere request*, or such a request as was made in the case, with the facts connected with it, should not have determined the husband's liability for the necessities supplied, nor should have availed to abridge the wife's credit for such necessities.

The facts of the case as they appeared on the trial, showed that the defendant, from the time of his marriage, which took place on Nov. 19, 1820, had continually ill-treated, and on one occasion, struck his wife; and that, on June 29, 1821, he beat her so brutally, at the same time abusing her and swearing that he would run her through, that she, in consequence, left his house that night in a state almost of nudity, and went to the residence of a friend, where she was, by reason of the ill-treatment received from her husband, confined to her bed for several days. For four years she resided partly with her friends and partly at lodgings. She then went to the house of her father, where she remained for fifty-four weeks; and to recover a compensation for her board and lodging during that time the action was brought.

Under this state of facts we are quite of the opinion that a mere notice to the wife to return, or a mere request on his part that she should return to his protection, may "not avail to abridge the credit," or to "determine his liability, for necessities supplied to her during the separation." After such a course of treatment as that described, the only evidence of any effort on his part to bring her back was contained in the fact that it was proved on the trial that, when the defendant's wife was residing with her father, *his brother called* and inquired after her, and conveyed the wish of her husband that she should return home. But if what was proved in the case amounted to anything more than a mere *scintilla* of evidence of an honest, *bonâ fide* offer on the part of the husband to take back his wife to his protection, and to discontinue such a course of treatment as, of necessity, had clothed her with the agency which she possessed, that, it seems to us, was clearly a

question which should have been submitted to the jury. And, indeed, although there seems to have been no request on the part of the defendant to have had that question submitted to the jury, and as there was no such point reserved at the trial, the case, on that ground, may be well decided. But although from the statement of the case it seems that that question was not expressly submitted to the jury, evidence seems to have been given — perhaps itself not amounting to more than a mere *scintilla* — from which it was claimed that it might be inferred that the husband subsequently refused to receive the wife; and it was claimed by the able counsel for the plaintiff, that, as this view was submitted in argument to the jury, they, by their verdict, appeared to have adopted it. The plaintiff's counsel thus, in effect, admitted that this was a question for the jury.

The main reliance of the defendant, however, was on the holding in the now overruled decision of *Horwood v. Heffer*¹ (even straining that case to suit the facts in *Emery v. Emery*), that nothing short of personal violence on the part of the husband could support an action for necessities supplied to the wife. The court, however, refused to follow the doctrine on that point of *Horwood v. Heffer*, which in fact, had on that point been repudiated and overruled in *Houlston v. Smyth*,² two years previously. On this question there was but one opinion. Garrow, B., says: "I take it to be a clear principle of law that if a husband conducts himself towards his wife with such a degree of misconduct and cruelty as to render it no longer safe for her to remain in his house, she is not to be turned out into the street to starve, or to seek relief in the parish workhouse, but is justified in leaving her home, and goes forth into the world with a credit for the necessities of life suitable to her condition. Such is the effect of the marriage contract; and if the husband by his misconduct forces her to leave his protection,³ she may seek the means of subsistence elsewhere, and those who from charity or other motives are willing to provide them, are entitled to recover a compensation from the husband." The correctness of this principle was fully concurred in by the other judges.

On the other point, the case is much less satisfactory. The

¹ 3 Taunt. 421, which is fully stated and considered, *infra*.

² 3 Bing. 127. See also *per* Lord Ellenborough, in *Liddlow v. Wilmot*, 2 Stark. 86, and *Alldis v. Chapman*, Selw. N. P. 263.

³ One would have supposed that the reasoning of the learned baron on this point would have led him to a more correct conclusion on the other. For if the

wife only obtains a credit for the necessities of life by the misconduct of her husband, compelling her to leave his protection, does not the very converse of this proposition suggest itself as the logical sequence that, when, *bonâ fide*, his misconduct ceases, so that she no longer is forced to remain away from him, her credit for the necessities of life ceases with the necessity which alone gave her the credit?

judgment was really that of but two of the four judges present. Alexander, L. C. B., on the trial, had some doubt on the question as to the right of recovery for the maintenance after the husband's expression of willingness to take his wife back, and his doubt had not been removed when the case was decided in the Court of Exchequer. Vaughan, B., too, not having been present when the case was argued, really took no part in it. The judgment on that point was that alone of Garrow and Hullock, BB. Their judgment simply rests on the entirely untenable ground that, as the spiritual court has jurisdiction to compel the return of the wife, resort must be had to that court for that purpose; and that a common-law court has not jurisdiction to deliver such a judgment as might, in effect, amount to a decree to compel her return; or that, if the common-law court decided that the period had arrived at which the husband might insist upon his wife's return, and, upon her refusal, that this liability would be determined, the spiritual court, a court of competent jurisdiction, might, notwithstanding, decree a divorce *a mensâ et thoro* and alimony, upon the ground of cruelty; and thus, a court of law having pronounced the obligation of the husband to supply necessaries to be at an end, a court of competent jurisdiction, upon the very same facts, might arrive at a decree diametrically opposite. Thus reasoning, the learned judge, Garrow, B., concludes as follows: "In this state of difficulty, the strong impression upon my mind, and which upon consideration I have been unable to remove, is, that if a husband drives his wife from his home by his misconduct, and sends her forth with an implied credit¹ arising from their relative situations, it is his duty by some positive act to determine that liability. If the wife subsequently returns, his liability is at an end;² but, in default of an amicable arrangement, he must go to the spiritual court and there obtain a decree for the purpose; and until some unequivocal act is done, a person making a claim in a court of law for necessaries supplied to the wife, is in my opinion entitled to recover against the husband."³

We think this reasoning is altogether illogical. We think the law, which is simply the sound reasoning in the case, apart altogether from authority⁴ (which is merely an aid to get at the sound

¹ How does he do this? By his cruelty; compelling her to leave him, with "the implied credit" for necessaries. Then, when, *bonâ fide*, the cruelty and compulsion cease, and are so found by a jury on sufficient evidence, does not the implied credit cease with the necessity?

² Why not equally so, when from the facts it becomes her clear duty to return?

³ *Emery v. Emery*, 1 Y & J. at p. 506.

⁴ "Law is the very reason of the case, and that which is not reason is not law." See *Cotterill v. Myrick*, 3 Fairf. 222. And see leading editorials by the author of this work on the Principles of the Common Law, in 6 Am. Law Reg. N. S., pp. 65, 129, 321, *et seq.* "Common law is but another name for common sense, tested

reasoning of the case), is, that when the wife, by the cruelty of her husband or by his failing to provide her with necessaries, is compelled to leave him, she, as an agent of necessity, carries with her the implied power to bind her husband, as the principal, by her contracts for such necessaries. But, in such case, the burden of proof is on the party who claims under such agency for supplying such necessaries, to affirmatively establish such agency, which he can only do by showing its creation by the necessities of the case. But when this is once done, and the husband seeks to put an end to the agency, the burden of proof shifts, and he must show affirmatively, to the reasonable satisfaction of a jury, that the agency has ceased because the very necessity which created it, and upon which alone it rested, has ceased.

We think the argument based on the theory of conflicting jurisdiction in the spiritual and common-law courts, is entirely untenable. It is strange that it had not occurred to the learned barons of the Exchequer that if their argument with reference to the ceasing of the liability of the husband at common law for necessities of the wife, was sound, because, in a manner, the spiritual court had jurisdiction over that question; that, for precisely the same reason, the common-law courts should never have assumed jurisdiction over the altogether cognate question, as to the liability of the husband for necessaries supplied to the wife in the first instance. For, in that case, is it not quite competent for the wife, on the ground of the cruelty of her husband, and of his failing to supply her with necessaries, to apply for a divorce *a mensâ et thoro* and alimony? And might it not be, to take the very position of Garrow, B., that while a court of common law might refuse to hold that the facts would justify a claim for necessaries supplied the wife on her implied agency; "the spiritual court, a court of competent jurisdiction, might, notwithstanding, decree a divorce *a mensâ et thoro* and alimony, upon the ground of cruelty; and thus, a court of law having pronounced the obligation of the husband to supply necessaries "not to exist; "a court of competent jurisdiction, upon the very same facts, might arrive at a decree diametrically opposite."¹

The case of *Horwood v. Heffer*² was the case relied on in *Emery v. Emery*,³ for the non-liability of the husband for necessaries supplied to his wife. *Horwood v. Heffer*, although really less

and systematically arranged by long experience." Harvard Law Tracts, Vol. v. p. 21.

¹ It is not a little singular that Mr. Justice Ritchie, now C. J. of the Supreme Court of Canada, entirely failed (as did the counsel in the case, and all the rest of the

court), in *Bennett v. Jones*, 4 Allen, N. B. R. 397, to notice this point, which is absolutely conclusive against the reasoning in *Emery v. Emery*, 1 Y. & J. 501.

² 3 Taunt. 421.

³ 1 Y. & J. 501.

unphilosophically decided than *Emery v. Emery*, contains two fallacies. One of these is expressly repudiated in *Emery v. Emery*, where, logically, both of these fallacies should have fallen, and actually did fall together. But, while in *Emery v. Emery* one of these fallacies is abandoned, the other, which in *Horwood v. Heffer* is really the ground upon which the principle repudiated in *Emery v. Emery* is made to rest, instead of having been likewise abandoned and repudiated in *Emery v. Emery*, is expressly followed and affirmed.

At the trial before Lawrence, J., in *Horwood v. Heffer*, the plaintiff was nonsuited on his opening, without his being allowed to go into evidence. The facts alleged were that the defendant had treated his wife with great cruelty; had taken another woman into the house, with whom he cohabited; that he had confined his wife in her chamber under a pretence of insanity, and that she had escaped. The action was brought for the value of necessities furnished to her after her departure. On the motion to set aside the nonsuit, and for a new trial, Lawrence, J., put his decision partially on the ground that, notwithstanding the facts named, he “thought that, however improper that conduct might be and however abhorrent from the feelings of a delicate woman, she might, nevertheless, *have had necessities* if she had stayed there.”

This doctrine that under such treatment the wife would have been bound to stay with her husband, has been repeatedly repudiated; refused to be followed, and overruled; as it is in fact in *Emery v. Emery*.

But Lawrence, J., goes further, and says: “She might, if she had thought fit, have sued for alimony and a divorce *a mensâ et thoro*.” And Mansfield, C. J., on the same point: “If this suit were maintainable, it would be necessary that the jury should, in the first place, determine whether the wife lawfully left her home or not. This would wholly supersede the necessity of a suit for alimony, or for a divorce *a mensâ et thoro*.” And the rule for a nonsuit and new trial was refused.

Now, although the decision in this case that, under such circumstances, an action would not lie for necessities supplied the wife, is, as has been shown, effectually overruled, and by the case of *Emery v. Emery* among others; in that very case (*Emery v. Emery*), while the fact of the antagonism in the two courts — spiritual, and common-law or temporal — has no weight whatever given to it as preventing an action for necessities in the first instance, and it is, therefore, decided that such a reason is entirely unsound; yet, with the strangest inconsistency, the two judges — Garrow and Hullock, BB., — on this very ground of antagonistic

jurisdiction, decided that at common law the courts, which, notwithstanding this antagonistic jurisdiction (or in one sense, it might more correctly be called a kind of concurrent jurisdiction), could give a decision recognizing or establishing the agency by necessity; could not, in consequence of such alleged antagonistic jurisdiction, give a further decision to the effect that such implied agency had ceased. As well might they, in any other case where courts have concurrent or antagonistic jurisdiction, such, for instance, as where courts of common law and probate can decide questions in a directly opposite way arising out of wills, repudiate the jurisdiction of one or other of the courts. And, even in the common-law courts themselves, there may be two actions in the same matter, as, for instance, in an action for the price of goods furnished, and a cross-action on a warranty connected therewith, where the effect in the two actions may be to neutralize or counteract each other. Or, even a better instance, where for libel a criminal and a civil remedy are given; in the one case a verdict of not guilty might be rendered, and be in direct antagonism to the decision of another jury, which, for the same alleged libel, might find ground for substantial damages. And yet in these cases no one has ever thought of suggesting that, because of such concurrent or antagonistic jurisdiction, the jurisdiction itself does not exist. We are, therefore, very strongly of the opinion that the doctrine in *Emery v. Emery*, which we have deprecated, cannot be sustained; and, for the reasons alleged, we consider that *Horwood v. Heffer*, when reversed on one of the grounds on which it was decided, was logically and of necessity reversed on the other; and that the doctrine in *Emery v. Emery* which we have been considering, which has been adopted by numerous text-writers, and which, as far as we are aware, has never been questioned or repudiated by any text-writer,¹ is not law. We therefore think that, on authority as well as on principle, the law on the subject is as we have stated it.²

The law in the matter is simply that of agency. It is an implied agency; an agency of necessity, like the strictly analogous agency of a ship-master,³ and in the one case as in the other,

¹ See 1 Bish. on Mar. & Div. § 572; 1 Pars. on Con. 393, note (o); 1 Addl. on Con. 144; Leake on Con. 571; 1 Ch. on Con. 246; Shelf. Mar. & Div. 438; Schouler, Dom. Rel. § 66; Schoul. Hus. & Wife, § 111; Story, Sales, § 64; 1 Story on Con. § 178. It is but right to observe that while all these writers have cited *Emery v. Emery*, 1 Y. & J. 501, without either of them pointing out the wrong

holding in the case, Leake in England, and Story (W. W.) in this country, have not cited it for the broad proposition which Bishop, as quoted by us (*ante*, p. 171), and the others have done; Chitty, however, in doing so, cautiously qualifying it with an "It has been held," etc.

² *Ante*, p. 166.

³ See *post*, Book II., Part IV., where this is fully considered.

being created by necessity, is terminated when that necessity has ceased.¹

This doctrine is established by numerous authorities. We will examine some of them. In *Hindley v. The Marquis of Westmeath*,² where, in pursuance of articles of separation (which, however, were declared invalid) securing a maintenance to the wife, she left her husband's house against his wishes, and continued to live apart from him, although he was willing and wished to receive her back and provide for her in his own house, it was held that he was not liable to be sued by tradesmen for debts contracted by her, even for necessaries.³

It was held in *Harris v. Morris*,⁴ that a husband who has turned his wife out of doors, cannot, by a general advertisement in the newspapers, or by particular notice to individuals, not to trust her, exempt himself from a demand for necessaries furnished to her while so living apart from him; and though a wife has been guilty of adultery, if her husband takes her again into his house, if he afterwards turns her out, he is liable for necessaries furnished to her.⁵

¹ The ground of claim is put in one of the American cases as resting on marital rights alone; thus, it is stated, doing away with the necessity of the introduction of any legal fiction. We do not concur with this view. The agency of necessity is, undoubtedly, founded on the marital rights of the wife to support from her husband; but it is the necessity of her receiving such support, from the improper conduct of the husband in improperly forcing her from his home without making provision for the supply of such necessity, that, *ex necessitate*, clothes her with her powers as agent. There is no more of a legal fiction in holding her to be such agent, from the necessities of the case, than there is in any other case where the necessities of the case bring into existence full agency powers. The very common case of the ship-master is, in this respect, strictly analogous to the case of the deserted wife. The ship-master is not only the agent of the owners of the ship, and, as such, is clothed with extraordinary powers when the circumstances arise which call for their exercise; but he also becomes, under a like necessity, the agent for the owners of the cargo, with similar extraordinary powers. From his position of trust, the necessities of the case cause a duty to devolve on him, in the performance of which he has full powers of agency, *ex necessitate*, as the wife has who has been improperly driven from her home, by her husband, without being provided with adequate

means for her support. See the cases in this section on the subject, *supra* and *infra*. And see *Brown v. Mudgett*, 40 Vt. 68.

² 6 B. & C. 200.

³ Bayles, J., thus, correctly, lays down the law: "If a husband improperly compels his wife to leave his house, he thereby gives her power to pledge his credit for necessaries; but, if she goes away without his consent, and against his will, I am of opinion that a tradesman giving her credit does so at his peril. If, under such circumstances, a deed is executed by the husband securing a provision to the wife, I think that he cannot be sued by any person who may supply goods to the wife, but that he is only liable to the trustees for the money which he has covenanted to pay, which was the form of action adopted in *Jee v. Thurlow*, 2 B. & C. 547. Such a mode of proceeding will make him liable to the extent of his covenant, and not to an indefinite amount, subject to no limitation; provided a jury can be prevailed upon to think that the articles furnished are necessaries, taking into consideration the rank and station of the wife." *Hindley v. The Marquis of Westmeath*, 6 B. & C. 200.

⁴ 4 Esp. 41.

⁵ Lord Kenyon, in so holding, said: "With respect to her having been formerly guilty of adultery, and having been in the Magdalen Asylum, though an adulterous elopement will prevent the hus-

In the case of *Houlston v. Smyth*,¹ where *Horwood v. Heffer* was repudiated,² it was held that, where a wife leaves her husband under such an apprehension of personal violence as a jury shall esteem to have been reasonable, her husband is liable for necessities furnished for her support. In this case, alimony was actually decreed; but as the decree was not for several months until after the claim for the necessities arose, the actual granting of the alimony was held not to have affected the case; so not only was *Horwood v. Heffer*³ here overruled, but the ground upon which it was decided was treated as unsound, and *Houlston v. Smyth*⁴ is entirely void of the inconsistency manifest in *Emery v. Emery*.⁵

band from being liable for articles furnished to the wife during the term of her elopement, that is no answer now. The husband has taken her back, and she was, from that time, entitled to dower. She was *sponte retracta*, and of course entitled to maintenance during coverture, if her husband turned her out of doors." And, again: "The next defence is, that he advertised her in a newspaper, and forbid persons to trust her. That cannot avail him; for, if he put her out of doors, though he advertised her, and cautioned all persons not to trust her; or if he even gave particular notice to individuals not to give her credit, still he would be liable for necessities furnished to her; for the law has said that, *where a man turns his wife out of doors, he sends with her credit for her reasonable expenses.*" *Harris v. Morris*, 4 Esp. 41.

¹ 3 Bing. 127.

² "The doctrine in that case cannot be law." *Per Best, C. J.*

³ 3 Taunt. 421; fully discussed *supra*, p. 175 *et seq.*

⁴ 3 Bing. 127.

⁵ 1 Y. & J. 501.

Holroyd, J., in *Montague v. Benedict*, 3 B. & C. 631, 636, where a wife was living with her husband, and certain articles were supplied her which the court held were not necessities, thus lays down the law: "Undoubtedly the husband is liable for necessities provided for his wife, where he neglects to provide them himself. If, however, there be no necessity for the articles provided, the tradesman will not be entitled to recover their value unless he can show an express or implied assent to the contract made by the wife. Where a tradesman takes no pains to ascertain whether the necessity exists or not, he supplies the articles at his own peril; and if it turn out that the necessity does not exist, the husband is not responsible for what may be furnished to his wife without his knowledge." And Bayley, J., "I

take the rule of law to be this: if a man, without any justifiable cause turns away his wife, he is bound by any contract she may make for necessities suitable to her degree and state. If the husband and wife live together, and the husband will not supply her with necessities or the means of obtaining them, *then although she has her remedy in the ecclesiastical court, yet she is still at liberty to pledge the credit of her husband for what is strictly necessary for her support.* [Here again is a virtual repudiation of the doctrine of both *Horwood v. Heffer*, and *Emery v. Emery*.] But, whenever the husband and wife are living together, and he provides her with necessities, the husband is not bound by the contracts of the wife, except where there is reasonable evidence to show that the wife has made the contract with his assent. *Etherington v. Parrott*, Lord Raym. 1006. Cohabitation is presumptive evidence of the assent of the husband, but it may be rebutted by contrary evidence; and when such assent is proved, the wife is the agent of the husband, duly authorized." *Montague v. Benedict*, 3 B. & C. at p. 635.

And, in *Seaton v. Benedict*, 5 Bing. 28, where it was held that a husband, who supplies his wife with necessities in her degree, is not liable for debts contracted by her without his previous authority or subsequent sanction, the law is thus laid down by Best, C. J.: "A husband is only liable for debts contracted by his wife, on the assumption that she acts as his agent. If he omits to furnish her with necessities he makes her impliedly his agent to purchase them. If he supplies her properly, she is not his agent for the purchase of an article, unless he sees her wear it without disapprobation."

Reed v. Moore, 5 C. & P. 205, is another case almost going to the extent of holding *contra* to *Emery v. Emery*. It was there held that to make a husband liable for his wife's board and lodging at

A very nice point in connection with the law as to the husband being liable for necessaries to the wife when justifiably living sep-

the house of a third person, when the wife leaves in consequence of a dispute, it must be shown, either that his conduct rendered it improper for her to live with him, or that he knew where she was residing and *did not make any offer to take her back, except upon conditions which he had no right to make.* Lord Abinger, C. B., in summing up, in *Emmett v. Norton*, 8 C. & P. 506, furnishes a very clear and satisfactory exposition of the general law relating to the wife's power to bind her husband for necessaries, in the following: "I take the law with respect to husband and wife to be this. Where a wife is living with her husband, and, where, in the ordinary arrangement of her husband's household, she gives orders to tradesmen for the benefit of her husband and family, and these orders are proper and not extravagant, it is presumed that she has the authority of her husband for so doing. This rule is founded on common sense, for a wife would be of little use to her husband in their domestic arrangements, if she could not order such things as are proper for the use of a house, and for her own use, without the interference of her husband. The law, therefore, presumes that she does this by her husband's authority.

"When the husband and wife are separated from each other, and do not live in the same house, new considerations arise. If the husband has turned the wife out of doors, and does not give her adequate means of subsistence according to his degree in life and his fortune, the law makes her his agent to order such things as are reasonable and necessary for herself, but it gives her no liberty to go into extravagance, or to pledge his credit for anything beyond what would be reasonable and necessary for her subsistence. If she be living in open adultery her husband is not bound by any contract which she may make, even for necessaries. If the husband has not turned the wife out of doors, and they have separated in consequence of domestic differences, and they do not live together, another consideration arises, which is this. Has the husband given the wife sufficient for necessaries suitable to his degree? For, if he has, he is not liable to her debts, even for necessaries; for, if the wife has from her husband wherewithal to provide herself with necessaries, she cannot go as her husband's agent and bind him even for necessaries. Suppose the husband has a given income, and it appears that he has settled it upon his wife; or he assigns to her and pays her a portion of that adequate to her

situation and necessities, the law does not authorize a tradesman to supply her fancies in any way, even for necessaries; and, even where she has an authority to order necessaries, she cannot go and order furniture and the like, which, though they may be necessaries, are not suitable to her condition, as her husband's agent."

A question came up in the very recent case of *Wilson v. Glossop*, 19 Q. B. D. 379, when it was held by the Queen's Bench Division, in an action against a husband for necessaries supplied to his wife, that the husband was liable; where it appeared that the wife had committed adultery with the connivance of her husband, and the husband subsequently turned her out of doors; that she had no means of support; and that the plaintiff supplied her with the necessaries in question when she was living separate from her husband. The Court of Appeal, sustained the judgment. *Wilson v. Glossop*, 20 Q. B. D. 354. Lord Esher, in the Court of Appeal, put the law thus: "When a man marries he is bound to keep and maintain his wife, unless she has committed adultery. And further, he is bound in honor to protect her from infamy. This man has done the reverse. The argument for him to exonerate him from liability to maintain his wife would, if it is sound, establish that if he had forced his wife to prostitution and lived on the proceeds of her shame, he might still, whenever he pleased so to do, turn her out of doors for that very adultery, and declare that he was no longer liable for her maintenance. Nothing would induce me to declare that such was the law except a superior authority which would bind me. I do not care to consider whether the wife can, under these circumstances, claim restitution of conjugal rights. That a husband, even after his wife has committed adultery, should turn her out without means of support is harsh; but to say that a man who has been an accomplice can do so is degrading. There is not and there could not be a symptom of authority in support of such a proposition." *Wilson v. Glossop*, 30 Q. B. D. at p. 536. The following are additional authorities for the husband's liability. *Fredd v. Eves*, 4 Harring. 385; *Blowers v. Sturtevant*, 4 Denio, 46; *Harris v. Morris*, 4 Esp. 41. *Eastland v. Burchell*, 3 Q. B. D. 432, *per* Lush, J.: "The authority of a wife to pledge the credit of her husband is a delegated, not an inherent, authority. If she bind him, she binds him only as an agent. If she leaves him

arate from her husband, came up in *Bazeley v. Forder*.¹ There the plaintiff, on the order of the defendant's wife, supplied clothes for the defendant's child. The defendant's wife was living separate from him for reasons which justified her in doing so; and the child, which was under seven years of age, was living with her against the defendant's will; an order of the Master of the Rolls having been made under the English act, empowering him to make such an order where the child was under that age (but which act contains no provision relative to the support of the child), giving the wife the custody. The wife had no means adequate to support her according to her husband's degree. It was held by Blackburn, Mellor, and Lush, JJ. (Cockburn, C. J., dissenting), that, as the child was by law properly in the care of the wife, the reasonable expenses of providing for it were part of the reasonable expenses of the wife, for which she had authority to pledge her husband's credit.

It is in one sense carrying the principle of agency by necessity a step further than any other case which so far has come under our notice. The very foundation of the doctrine of agency by necessity is, that it is an involuntary agency, — an agency not coming into existence at the will of the principal, but by the necessities of the case; and as regards the case of a married woman as such agent, the agency is as a general rule in opposition to the will of the principal; and yet it is so far effective, that as long at least as the separation is justifiable, the express notice and declaration of the principal that his wife is not his agent, has no effect whatever to relieve him from the liability of the acts of his agent by necessity, — an agency which not he. but the law, has created and established.

In the case of *Rawlyns v. Vandyke*,² Lord Eldon said it was a question for the jury whether a husband living apart from his wife, and allowing the children to remain with her, did not constitute her his agent, and authorize her to contract debts for clothing and necessaries for them. But then, as Lush, J., in effect pointed out in *Bazeley v. Forder*, the agency was created by the voluntary act of the husband in allowing the children to live with her. Here it was against the will of the husband that the child remained with the wife. But against his will, in *Bazeley v. Forder*, the law gave the wife the custody of the child. If the agency were voluntary, as in the case of *Rawlyns v. Vandyke*, the hus-

without cause and without consent, she carries no implied authority with her to maintain herself at his expense. But if he wrongfully compels her to leave his home, he is bound to maintain her elsewhere."

See *McCutchen v. McGahay*, 11 Johns. 281; *McGahay v. Williams*, 12 Johns. 293; *Baker v. Barney*, 6 Johns. 72.

¹ L. R. 3 Q. B. 559.

² 3 Esp. at p. 252.

band would be liable. If involuntary, — the law taking the child from him and placing it with the wife, — it comes pretty close in analogy to the case of the wife herself, to hold that the law implies, by the necessity of taking the child from the father and giving it to the mother, that the same agency is given by necessity to the mother as she would have been clothed with if she had the custody by the voluntary act of her husband; as in such case she would have had, according to *Rawlins v. Vandyke*.¹

¹ Except on this ground, we see no satisfactory answer to the very able dissenting judgment of Cockburn, C. J. As the point is one both of interest and importance, we quote fully from the judgment of the court, delivered by Blackburn, J., as follows: "A wife, when separated from her husband in consequence of misconduct on his part rendering it improper for her to remain with him, is in the same position as if he turned her out of doors, and is by law clothed with power to pledge his credit for her reasonable expenses, according to her husband's degree, unless she is in some other way supplied with the means of providing them. If, therefore, the plaintiff's claim here had been for reasonable apparel supplied to the wife herself, or for the supply of food for her household servants, such as, according to her husband's degree, would be reasonable, there was evidence sufficient to be left to the jury in support of his claim to charge the husband. And the only question remaining is, whether, the wife having the custody of the infant, against the husband's will, but by force of an order made under the statute, the reasonable expenses incurred in providing for the infant are part of the wife's reasonable expenses within the meaning of the rule of law. If they are, there was evidence that the defendant's wife was separated from the defendant under such circumstances as gave her, by law, authority to pledge her husband's credit for them, and the verdict must stand; if they are not, I do not see any legal principle on which the defendant can be made liable. There is, I believe, no authority or case * bearing on the point; but, I think, on principle, that as soon as the law became such that a wife separated from her husband might properly and legally have the custody of her infant children under the age of seven years, though the husband objected, it became a reasonable and necessary thing that she should clothe and feed those children according to their degree. It is true that in one sense this is an expense voluntarily incurred by the

wife, as she is not obliged to ask for or take the custody of her child; but I think the wife's authority in such cases is to pledge the husband's credit for her reasonable expenses, though they exceed what she is obliged to incur. The wife of the richest subject in the realm, when driven from her husband's roof, is not obliged to have servants or clothes suitable to her degree. If she chooses to clothe herself economically, and dispense with attendance, she may do so; yet I apprehend it will not be disputed that she may bind her husband by ordering clothes and hiring servants reasonably fit for her degree; and if her husband's station be high enough to make it reasonable, ordering liveries for those servants. All those expenses are voluntary in one sense, for if the wife chooses she need not incur them. I cannot but think that the very object of the statute was that a wife should not be compelled to do violence to her feelings as a mother by parting from her infant child, when she was not in fault; and that when she does choose to keep her child, and is by law empowered to do so, the expenses necessarily incurred in doing so are necessary and reasonable, having reference to her station, not merely as the wife of a person in the station of the defendant, but as the wife properly having the custody of the infant children of the marriage. It is argued that if this is so, the liability of the father is changed; for a father's legal obligation to support his child is not more than to supply such food and clothing as are necessary for health; whilst if there is any authority given by law to the wife, it is to pledge the husband's credit for such necessities for the child as may be reasonable with reference to the husband's station. This is true, but the same remark applies to the wife. A husband, whilst his wife resides with him, chooses his own style of life, — at least in theory. In the quaint language of Hyde, J., in *Manby v. Scott* (1 Mod., at p. 138), if 'the wife will have a velvet gown and a satin petticoat, and the husband thinks mohair or faraneton for a gown, and watered tabby for a

* See *infra*, *Hancock v. Merrick*, 10 Cush. 41.

The question as to the liability of the husband for necessities to his wife who, having left him for sufficient reason, refused,

petticoat, is as fashionable, and fitter for his quality, the husband is to decide, and neither the wife nor a jury, it may be, consisting of drapers and milliners.' But when the husband has without cause turned his wife out of doors, or by his own fault rendered it impossible for her to reside with him, the rule is changed: the husband is no longer the sole judge of what is fit; but the law gives the wife, in such a case, authority to pledge his credit for her reasonable expenses, leaving it to be determined by others what is reasonable. This increase of the husband's liability only comes into play when he is in the fault, and so is not unjust. I think the increased liability incurred in respect of the wife having the custody of the children falls within the same principle, and therefore I think that this rule should be discharged."

It has been frequently held in this country, where a wife justifiably leaves her husband, and takes her child or children with her, and the husband makes no objection to her doing so, that it will be implied that he is as liable for the support of the children with their mother as he is for the support of his wife. This accords with our own view, as stated above. In *Reynolds v. Sweetser*, 81 Mass. 78, the evidence showed that a husband had been guilty of violence and cruelty towards his wife, in consequence of which she left his house, having reasonable and well-grounded apprehension of further violence from him, taking with her their child of about six years old, which was taken by its mother to the plaintiff to board, the husband having made no suitable provision for their support. The court held, that as the father knew the child was there, and took no steps for reclaiming it, or providing for it in any other way, he was liable for that which its mother procured to be afforded by the plaintiff. In *Rumney v. Keyes*, 7 N. H. 571, 580, following *Rawlins v. Vandyke*, 3 Esp. 252, it was held, that if a husband, living in a state of separation from the wife, suffers his children to reside with their mother, he is liable for necessities furnished them; for, as a father, he has the right to the custody of his children, and may obtain possession of their persons by *habeas corpus*; but where he does not assert that right, and suffers them to remain with their mother, he thereby constitutes her his agent, and authorizes her to contract debts for clothing and necessities. This case was followed and affirmed in *Allen v. Aldrich*, 29 N. H. 63, 73, and in

Walker v. Loughton, 31 N. H. 111, 115. *Kimball v. Keyes*, 11 Wend. 33, also holds that one living separate from his wife and daughter is undoubtedly bound to furnish them with necessities suitable to their condition, and his omission to do so would furnish them with a general credit to that extent. But in *Pidgin v. Cram*, 8 N. H. 350, where a husband and wife separated by mutual consent, it was held that, in order to charge her husband for the support of their child living with her, there must be a clear and palpable omission of duty in that respect on the part of the father; and where there was nothing in the case to show but what he was ready and willing to furnish all that was wanted for the use of the child, he was held not liable for supplies to the child furnished by the plaintiff. The case of *Hancock v. Merrick*, 10 Cush. 41, is very nearly identical in effect with *Bazeley v. Forder*, L. R. 3 Q. B. 559, and the decision arrived at is contrary to the holding in *Bazeley v. Forder*. In *Hancock v. Merrick* the defendant's wife left him, for the cause of cruelty, on Dec. 13, 1848, taking their child with her. On May 12, 1849, she obtained a divorce from her husband, and at the same time the custody of the child was awarded to the wife until the next term of court. In September, 1849, alimony was granted to her, to commence at the date of the divorce (May 12, 1849), and was paid as it fell due. The custody of the child was continued with the mother until the next term. The child had resided with the mother at the plaintiff's, and had been furnished by him with board from Dec. 13, 1848; but this had been contrary to the wish of the defendant, who had repeatedly requested to have the custody of the child. The claim was for board from Dec. 13, 1848, to May 12, 1849, and also from May 12, 1849, to Sept. 29, 1849. It was held that no liability attached to the father and husband for the board of the child taken away from his home. The decision went upon the ground (see *Reynolds v. Sweetser*, 81 Mass. at p. 81), not only that the child was absent without his consent, but contrary to his wishes; and that he had repeatedly requested to be permitted and allowed to have and retain the custody of the child. It was upon the ground that, in manifesting an earnest wish and desire to receive the child into his own care, he impliedly, but distinctly, indicated and expressed also an intention and willingness to discharge his parental duties, that it was adjudged that he was under no

from expectation of the ill-usage she had previously received from him being resumed, to return to him again, notwithstanding his

legal responsibility to the plaintiff for the supplies he had furnished, or the expenses he had incurred in supporting the child. As closely as the facts in the two cases approach each other, we are inclined to think that both *Bazeley v. Forder*, L. R. 3 Q. B. 559, and *Hancock v. Merrick*, 10 Cush. 41, notwithstanding the holding in the one case that the father was liable, and in the other that he was not, are correctly decided. There is one point in the two cases where there is an essential difference between them. In the English Act (2 & 3 Vic. c. 54, § 1), there is no provision made for the support of the child or children; and on the principle of agency of necessity, it might well be held, that where, under such an act, the law placed the custody of the child with its mother, it was implied that she was clothed with the same powers as an agent of necessity, as though she were, on common-law principles, in proper custody of it without any fault on her part, and that the liability of the husband and father would equally attach in the one case as in the other. But in *Hancock v. Merrick*, 10 Cush. 41, it was quite otherwise. There it is clear, without room for controversy, that down to May 12, 1849, there was no claim against the father, for the child was voluntarily kept from him against his will. And although the custody of the child was legally given to the wife on May 12, 1849, yet, in September, 1849, alimony was granted to her, beginning at May 12, 1849. It was therefore competent for the court to consider the support of the child in making the allowance of alimony, as jurisdiction over the whole matter, as well the amount of the allowance as the decree for the divorce, was with the court; and hence, it would well seem, that no claim against the defendant could be sustained in excess of the alimony, any more for the support of the child than for its mother. Making this distinction between the cases, we are inclined to think they are both correctly decided. In support of this distinction which we have taken, we find that by the statute in Massachusetts, in effect when *Hancock v. Merrick*, 10 Cush. 41, was decided, provision was made for the granting of alimony for the suitable support and maintenance of the wife on being divorced, "and such children of the marriage as are committed to her care and custody." See General Statutes of Massachusetts, A. D. 1860, chap. 107, § 43.

We find a quite old American case (A. D. 1808), *Stanton v. Willson*, 3 Day

(Conn.), 37, where the same point is decided and in the same way as in *Bazeley v. Forder*, L. R. 3 Q. B. 559; and in the one case as in the other by a divided court. Although the facts of the case are different, the *ratio decidendi* of the one case is identical with that of the other. In *Stanton v. Willson* a husband and wife were divorced by a decree of the legislature, alimony was allowed her, and she was constituted sole guardian of two of their infant children. In a suit against the father of the children for the education and support of the children furnished by the plaintiff, it was claimed, *inter alia*, that as the alimony was given "for the nurture and education of the children as well as for the support of the woman," the father was not liable for their support. But the court said: "By the divorce the relation of husband and wife was destroyed, but not the relation between Bird (the father) and his children; his duty and liability as to them remained the same, except so far forth as he was incapacitated or discharged by the terms of the decree. This decree takes from him the guardianship of two of his children, and with it the right which as natural guardian he might have otherwise exercised; and releases him from those duties only which a guardian as such is bound to perform. This transfer of the guardianship to the plaintiff vested her with powers similar to guardians in other cases; and the appointment of the plaintiff to this trust did not subject her to the maintenance of the children, her wards, any more than a stranger would have been subjected by a like appointment. By accepting the trust she became bound to provide for, protect, and educate them at the expense of Bird, *unless the decree of the general assembly has made other adequate provision*, which by the terms of that decree she is bound to apply. This is not the case here. The sum allowed was directed to be paid to her *as her part and portion of Bird's estate, and in lieu of all claims of dower*." This makes the facts of the case identical in effect with those of *Bazeley v. Forder*, L. R. 3 Q. B. 559. And the decision is put upon precisely the ground which, before we had examined *Stanton v. Willson*, we intimated was the only ground upon which *Bazeley v. Forder* could be sustained. The court said: "It may be generally true that minors under the government of parents cannot bind their parents for necessities without their consent. The danger of encouraging children in idleness and disobedience, and of their being inveigled into expense by

offer to receive her back, is considered in *Thomas v. Alsop*.¹ The decision is in accordance with the views we have expressed in

the artful and designing, furnishes a sufficient reason for the rule; but neither the rule nor the reasoning will apply to the charges in respect to two of the children in this case. The articles were furnished by the guardian herself or at her request, who by virtue of her trust had full power to contract, and make the father liable for necessaries, not only without but against his consent." *Stanton v. Willson*, 3 Day, p. 37. She thus by virtue of her trust became an agent of necessity, just as a ship-master does in cases of emergency by virtue of his trust; or as a married woman does, who by virtue of her marital rights for support is clothed with powers to bind her husband as his agent *ex necessitate*. On this ground we think that *Bazeley v. Forder*, L. R. 3 Q. B. 559, *Hancock v. Merrick*, 10 Cush. 41, and *Stanton v. Willson*, 3 Day, 37, are all well decided, notwithstanding that the first and last of these cases were decided by only a majority of the judges. On the same principle that we think is the sound one, and on which we think these cases are to be sustained, we are also of the opinion that the later Connecticut case of *Finch v. Finch*, 22 Conn. 411, in the same State in which *Stanton v. Willson*, 3 Day, 37, was decided, is also to be sustained. *Finch v. Finch* was also decided by a bare majority of the court; and while we think that the case was correctly decided we do not think that the reasoning of either the majority or the minority of the court, as applicable to the facts in the case, was sound.

It will be noticed that the decree in the case of *Stanton v. Willson* was made by the legislature, while in the later case of *Finch v. Finch* the decree was by the Superior Court. By the Connecticut act in force at the time the decree was made in *Finch v. Finch*, it was provided that the Superior Court should have exclusive jurisdiction of all petitions for divorce; might assign to any woman divorced such reasonable part of the estate of her late husband, not exceeding one third part thereof, as in its discretion the circumstances of the estate would admit, and might make such order as between the parties for the custody, care, and education of the children of the marriage as such court might deem necessary and proper (see General Statutes of Connecticut, A. D. 1860, tit. 13, c. 3, §§ 32, 36, and 38. Section 40 also relates to the subject, but that section was not passed until after *Finch v. Finch* was decided, and was prob-

ably passed in consequence of the decision in that case). In the case of *Finch v. Finch* three of the judges held that the divorced husband was not liable for the support of the minor children in the custody of the mother, while two of the judges held that he was. The decision of the majority of the judges mainly rests upon the ordinary common-law legal liability of the father for the support of his minor children, quoting on that point very largely from the English cases, and from the American cases which correctly lay down the law on that point. True, they dissent from the holding in *Stanton v. Willson*, 3 Day, 37, yet we think a correct appreciation of what we have shown to be the *rationale* of that case would have led them to have sustained it without affecting their decision in *Finch v. Finch*, 22 Conn. 411. The minority of the court undertake to follow the decision in *Stanton v. Willson*, but they fail to notice the essential difference between the two cases. While *Stanton v. Willson* is, as we have shown, identical in principle with the recent English case of *Bazeley v. Forder*, L. R. 3 Q. B. 559, the later Connecticut case of *Finch v. Finch*, 22 Conn. 411, is identical in principle with the Massachusetts case of *Hancock v. Merrick*, 10 Cush. 41. And while in two of these cases it was decided that the father was not liable for the support of his minor children, and in the other two cases it was decided that he was liable, we think they were all correctly decided within the principle on which *Stanton v. Willson*, 3 Day, 37, was expressly decided, and the ground of which decision, in our comments on *Bazeley v. Forder*, we had anticipated prior to our having examined *Stanton v. Willson* at all. The bill in this case (*Finch v. Finch*) prayed for a divorce from the defendant, for alimony from his estate, and for the custody, control, and education of said children, with such provision for their support and education as should be just and legal. The court passed a decree granting the divorce, assigned the custody of the children to their mother, and "decreed that the sum of \$1,222 be assigned to the present plaintiff as such alimony and allowance." On this state of facts we can see no ground whatever — this sum of \$1,222 having been duly paid — for any claim against the father for payment of any further sum for the support of the minor children, while under such decree they remained in the custody of the

¹ L. R. 5 Q. B. 151.

examining *Emery v. Emery*.¹ The question came up under the 31 and 32 Vic. c. 122, sec. 133, which gives the power to the guardians of the union or parish to order the husband of a married woman requiring relief, to maintain his wife by payment of such sums as they might direct. Although the decision is under this act, the principle as to the liability of the husband after the wife's refusal to return is, on that point, equally applicable to cases at common law.

The appellant in the case was summoned before justices under the act, when it appeared that the appellant's wife had left him

mother. We think such a claim could be no better sustained against him than in such a state of facts could an additional action for the counsel fees and costs of the divorced wife; and on that point we quite concur with the defendant's counsel in *Shelton v. Pendleton*, 18 Conn. 417, 420, that "the only way to compel the husband to make a reasonable advance to the wife for counsel fees and other expenses is by an order of the court granting the divorce. If there is no special allowance, this is always taken into consideration where a decree for alimony is passed." But in answer to this point the minority judges in *Finch v. Finch*, 22 Conn. 411, 422, say: "Besides, it should be considered that the alimony given to the divorced wife is given for her support and not theirs; and no court in fixing the proper sum for alimony has a right to take into the account the children of the marriage, respecting whom there may by possibility be an order of the court founded upon their necessities." Independent of the fact that in this case the bill was expressly filed, *inter alia*, for such provision for the support and education of the children as should be just and legal, and that the decree ordered a payment for "such alimony and allowance" (see *Ibid.* p. 413), yet independent of this the minority judges were wrong when they said: "No court in fixing the proper sum for alimony has a right to take into the account the children of the marriage," etc. The rule is the reverse, both in England and in this country. Thus, in *Cranwell v. Cranwell*, 19 L. T. N. s. 611, it was stated by Wilde, J., that on the granting of a divorce the court makes a permanent provision for the children along with the innocent party. And see *Brisco v. Brisco*, 2 Hagg. Consis. 199, 201, and *Cooke v. Cooke*, 2 Phillim. 40, as to the principles governing the court in their deciding as to the alimony which will be allotted. The same principles are recognized and acted on in this country. See *Amos v. Amos*, 4 N. J. Ch. 171, where

it was held that an allowance should not be made on account of the children *where they were grown up*. And as to the matter being one of judicial discretion as in England, to be exercised with reference to the facts of the case in granting alimony, see *McGee v. McGee*, 10 Ga. 477; *Germond v. Germond*, 4 Paige Ch. 643; *Lawrence v. Lawrence*, 3 Paige Ch. 267; *Fishli v. Fishli*, 2 Litt. (Ky.) 337; *Harris v. Davis*, 1 Ala. 259.

In *Reavis v. Reavis*, 1 Scam. (Ill.) 242, the order was that there should be allowed yearly such "alimony" for the wife and her child as the evidence should show, from the circumstances of the parties, to be fit, reasonable, and just; the Illinois statute being on the point the same in substance as that of Connecticut. And see *Dicken v. Dicken*, 38 Ga. 663; *Waldron v. Waldron*, 55 Pa. St. 231; *Jolliff v. Jolliff*, 32 Ill. 527; *Bergen v. Bergen*, 22 Ill. 187; *Foote v. Foote*, *Ib.* 425; *Marker v. Marker*, 11 N. J. Eq. 256; *Nicely v. Nicely*, 3 Head (Tenn.), 184; *Thompson v. Thompson*, 10 Rich. Eq. (S. C.) 416. In *Bedell v. Bedell*, 1 Johns. Ch. 604, Chancellor Kent granted the custody and care of a child of six years old to her mother, and granted as alimony for the maintenance of the mother and her child the whole of the defendant's income. It is laid down in *Richmond v. Richmond*, 2 N. J. Ch. 90, 93, by Chancellor Pennington, as a principle, that the court in placing the children under the charge of their mother means to impose no burdens upon her of a pecuniary character; but, whatever rules may obtain as to the allowance for the wife, the children should be fully maintained in a manner corresponding with the condition in life of their father. On the whole, we think *Bazeley v. Forder*, L. R. 3 Q. B. 559, was correctly decided, and that, on the same and only principle on which we think it can be sustained, the three American cases we have examined in connection with it are also sound law.

¹ 1 Y. & J. 501.

sixteen years before on account of his ill-usage of her, from the effects of which she was still suffering; and she had then lately received parish relief and was still chargeable.¹ The husband had not contributed to her support during the separation, but had applied to her to return to cohabitation. At the hearing he offered to receive her back at his house, and promised not to ill-use her. But she refused to return on account of the brutality she had previously received. The justices were satisfied by evidence that it was dangerous to the health of the wife to return to cohabitation; and they made an order on the husband to pay a weekly sum towards the relief of the wife. On appeal from this order, the Court of Queen's Bench held that the order was rightly made, notwithstanding the husband's offer; as the question (just as at common law it would be for the jury) was for the justices to decide whether or not the wife was justified in leaving, and, notwithstanding the husband's offer, refusing to return to her husband; and that, in effect, they had found that she was justified. *Flanagan v. Bishopwearmouth*² was relied on by the counsel for the appellant, but as that was decided under the Vagrant Act, making a man punishable for refusing to support his wife, an offer to maintain her at home would prevent a conviction under that act for "refusing" to maintain her, and that case was held to have no application to this. Although in the judgment of Cockburn, C. J., there are some not well-considered sentences which, isolated from their context, would imply otherwise, the general trend of his judgment, as well as that of his colleagues, is that, when a wife from ill-usage by her husband justifiably leaves him, his mere offer to receive her back need not necessarily be accepted by her; but on her refusal to return, the continued liability of the husband will depend upon the fact whether or not the wife could safely return, — a matter which, under the act named, and at common law, would be respectively for the justices and the jury to determine.³

¹ It has been held that a woman is not "chargeable" to the parish, where she has a home to return to, or other means of support. See 4 Burns' Inst. 299; *Rex v. Flintan*, 1 B. & Ad. 227; *Sweeney v. Spooner*, 3 B. & S. 329; *Cargill v. Cargill*, 1 Sw. & Tr. 235; 27 L. J. P. & M. 69.

² 8 E. & B. 451; 27 L. J. M. C. 46.

³ The case of *Horwood v. Heffer*, 3 Taunt. 421, has been repudiated in this country on the point in which *Emery v. Emery*, 1 Y. & J. 501, disagrees with it, as emphatically as it has been in England. And here, as there, *Horwood v. Heffer* has been denounced as not law.

See *Blowers v. Sturtevant*, 4 Denio, 46; *Descelles v. Kadmus*, 8 Iowa, 51, 54. But while this is the case with regard to *Horwood v. Heffer*, we know of no case, either in England or in this country, where *Emery v. Emery*, on the point on which it does not differ from *Horwood v. Heffer*, has been expressly overruled or repudiated. As we have pointed out, the deservedly condemned decision of *Horwood v. Heffer* is, in its way, while unsound, really less illogically unsound than the case of *Emery v. Emery*. And, as we have seen, though *Emery v. Emery* has not been expressly overruled in England, on the point on which it is wrong, it has not been followed

Where husband and wife separate by mutual consent, the wife making her own terms as to her income, and that income proves

there, but, in effect, has been overruled. Here, too, notwithstanding the manner in which it has been cited by the great body of the American text-writers, without disapprobation or exposure of the fallacy on which it is based; while we cannot find that it has been expressly repudiated in any American case, we are quite satisfied that it has never been followed by any case decided in this country; and numerous cases are, and the whole trend of the cases all over this country is, opposed to the wrong holding in *Emery v. Emery*. The case of *Walker v. Loughton*, 31 N. H. (12 Fost.) 111 is a valuable one on the subject. Here, directly *contra* to *Emery v. Emery*, it was held that the husband who has carelessly deserted his wife may seek a reconciliation, and if the wife, under such circumstances, refuses to live with him again without good cause, she becomes from that time the party in the wrong, and has no longer any authority to pledge his credit, even for necessities, more than she would have had if she had herself originally left him without cause. Independent of the grounds of the decision in *Emery v. Emery*, the actual holding in that case, on the facts (*see ante*, p. 172 *et seq.*), was not essentially different from the holding in *Walker v. Loughton*, where the grounds of the decision are unquestionably correct. The court there says: "But it is objected that the evidence fails here to show any wish or effort on the part of the husband, in good faith, to seek a reconciliation, or that his wife should return to live with him again, and the conversation between him and his family is relied on to disprove any such wish on his part. This is the same conversation, proved on the part of the defendant, to show his desire for a reconciliation. We have, therefore, considered with care what was then said, and our conclusion is, that what was said by the husband, on that occasion, completely disproves any sincere wish that his wife and daughters should remove to his residence to live with him. It was a formal request to them to go to his house; but it was accompanied with such threatening language, and such unreasonable claims upon them, as were calculated, and, as it seems to us, must have been designed to prevent their removal. The effect of the whole conversation, as it impresses our minds, is rather a notice to them not to come to his house, a threat of undefined evil, if they did come, rather than a sincere invitation to them to come." The court held that the offer, not having been

made in good faith, was no defence to an action for necessities furnished subsequent to the conversation. See *McCutchen v. McGahay*, 11 Johns. 281; *McGahay v. Williams*, 12 Johns. 293.

In *Calkins v. Long*, 22 Barb. 97, 106, it was held, where there was an agreement for a separation, that, unless the agreement was for a separation during life, if the husband offer to take back his wife and to maintain her, it puts an end to the agreement, and a court of equity will not enforce the payment of the separate allowance to the wife. The principle on which the Board of Supervisors, etc. *v. Budlong*, 51 Barb. 493, was decided, is, that the husband's liability for necessities provided by other persons for his wife's support, rests entirely upon the ground of his neglect or default. *Ergo*, when this neglect or default ceases, the liability would cease. So, in the *People v. Naehr*, 30 Hun (N. Y.), 461, the following are laid down as fundamental rules: The wife is entitled to reasonable support by the husband. It is her duty as well as right to live with him in such proper place as he provides. He is entitled to determine not only the place, but their style of living, and it is her plain duty to follow him wherever his interest, necessity, or reasonable wish may lead. It is only when he neglects or refuses to properly provide, or maltreats her, or is guilty of infidelity to her, that she is justified in refusing her submission to his reasonable requirements in this respect. Here again his liability is strictly governed by the actual necessities of the case; the liability, of course, determining with the necessity. See, also, where similar principles are laid down, *Brown v. Mudgett*, 40 Vt. 68; *Noreross v. Rodgers*, 30 Vt. 588; *Evans v. Fisher*, 5 Gilman (Ill.), 569; *Allen v. Aldrich*, 29 N. H. 63. In *Lindenschmidt v. Lindenschmidt*, 29 Mo. App. 295, where differences took place between a husband and wife, and a separation with his consent, it was held that he was liable for her support, but, expressly, that such liability would cease, on her refusal to return, after a *bonâ fide* offer by him to receive and support her. See *Dwyer v. Dwyer*, 26 Mo. 633. In *McGahay v. Williams*, 12 Johns. 293, the court held that if a woman leaves her husband and lives separately from him, he is not liable to her contracts for necessities, although the person giving credit to her does not know of the elopement; but if she offers to return, and her husband refuses to receive her, his liability to her contracts for necessities revives from that time. The con-

insufficient for her support, the wife has no authority to pledge her husband's credit.¹

In *Eastland v. Burchell*, the defendants — husband and wife — executed a deed of separation, by the terms of which the wife retained the income of property settled to her separate use on her marriage, which brought her in £297 15s. 2d. per annum. The husband covenanted to pay her £20 a year towards the maintenance of three of the children of the marriage, and the wife covenanted to maintain these children until they were twenty-one, and not to apply to her husband for further assistance. The husband had kept up the annual payment of £20 in accordance with the terms of the deed. Plaintiff sued defendants in the county court to recover the price of meat supplied to the wife after the separation, and the judge at the trial, on hearing the wife's evidence, found that her income was insufficient for her support, and ruled that she had authority to pledge her husband's credit for the price of the meat. On appeal to the Queen's Bench Division, the decision was reversed.²

verse of this proposition is clearly, equally correct. See *McCutchen v. McGahay*, 11 Johns. 281. So in *Clement v. Mattison*, 3 Rich. (S. C.) 93, it was held, that a wife, not having been guilty of adultery, went abroad with a husband's credit for necessities, (1) when he had treated her with *sevitia*, although he may not have desired to expel her from his house; (2) when he had driven her away, intending to expel her; and (3) when he had refused to receive her upon her return, although she may have departed without cause. See *Houts v. Houts*, 17 Ill. App. 439, where a wife refused to live with her husband, on a *bonâ fide* request from him, and her application, under a statute of the State, for separate maintenance, was denied. In California, by sec. 175 of the Civil Code, it is provided that a husband abandoned by his wife is not liable for her support until she offers to return, unless she was justified, by his misconduct, in abandoning him; nor is he liable for her support when she is living from him by agreement, unless such support is stipulated in the agreement. See, under this section, *Jacobs v. Scott*, 53 Cal. 74; *Heney v. Sargent*, 54 Cal. 396; *Nissen v. Bendixsen*, 69 Cal. 521.

¹ *Eastland v. Burchell*, 3 Q. B. D. 432.

² Lush, J., in delivering the judgment of the court, thus laid down the law applicable to the case: "The authority of a wife to pledge the credit of her husband is a delegated, not an inherent, authority. If she binds him, she binds him only as his agent. This is a well-established doc-

trine. If she leaves him without cause and without consent, she carries no implied authority with her to maintain herself at his expense. But, if he wrongfully compels her to leave his home, he is bound to maintain her elsewhere, and if he makes no adequate provision for this purpose, she becomes an agent of necessity to supply her wants upon his credit. In such a case, inasmuch as she is entitled to a provision suitable to her husband's means and position, the sufficiency of any allowance which he makes under these circumstances is necessarily a question for the jury. Where, however, the parties separate by mutual consent, they may make their own terms; and so long as they continue the separation, these terms are binding on both. Where the terms are, as in this case, that the wife shall receive a specified income for her maintenance, and shall not apply to the husband for anything more, how can any authority to claim more be implied? It is excluded by the express terms of the arrangement. It is obviously immaterial whether the income is derived from the wife's separate property or from the allowance of the husband, or partly from one source and partly from the other. It is enough that she has a provision which she agrees to accept as sufficient. She cannot avail herself of her husband's consent to the separation, which alone justifies her in living apart from him, and repudiate the conditions upon which that consent was given. And it seems superfluous to add that no third person can claim to

Two questions in connection with the agency of a married woman came up, and were decided in *Drew v. Nunn*¹ in the Court of Appeal. These were, first, as to the effect of insanity in revoking the agency; and second, as to the limitation of such revocation as to parties continuing to deal with the agent without knowledge by them of the principal's insanity. The plaintiff was a tradesman, and the defendant had given his wife authority to deal with the plaintiff, and had held her out as his agent, and as entitled to pledge his credit. Afterwards the defendant became insane, and whilst his malady lasted, his wife ordered goods from the plaintiff, who accordingly supplied them. At the time of supplying the goods, the plaintiff was unaware that the defendant had become insane. The defendant afterwards recovered his reason, and then refused to pay for the goods supplied to his wife by the plaintiff. On the two questions arising in the case, the Court of Appeal decided that insanity does revoke the agency; but that, in the absence of knowledge or notice of the insanity on the part of those to whom the agent had been held out as such by the principal, the authority to trust the agent was continued, and that, therefore, in this case, the plaintiff was entitled to recover.²

disturb the arrangement made between the husband and the wife, and to say that he will, by supplying goods to the wife on credit, compel the husband to pay more than the wife could have claimed, that is, the stipulated allowance. He can derive no authority from the wife which she is incompetent to give." See *Hodgkinson v. Fletcher*, 4 Campb. 70; *Hunt v. De Blaquière*, 5 Bing. 550; *Nurse v. Craig*, 2 B. & P. N. R. 148; *Johnston v. Sumner*, 3 H. & N. 261; *Biffin v. Bignell*, 7 H. & N. 877; *Beale v. Arabin*, 36 L. T. 349.

The law on the subject is the same under the decisions in this country. See *Joyce v. McAvoy*, 31 Cal. 273; *Robertson v. Robertson*, 25 Iowa, 350; *Loud v. Loud*, 4 Bush (Ky.), 453; *Calkins v. Long*, 22 Barb. 97; *Bettle v. Wilson*, 14 Ohio, 257; *Buckner v. Ruth*, 13 Rich. (S. C.) 157; *Baker v. Cooper*, 7 S. & R. 500; *Lehor v. Beaver*, 8 W. & S. 102; *McCubbin v. Patterson*, 16 Md. 179; *Carson v. Murray*, 3 Paige (N. Y.), 483; *Pickett v. Johns*, 1 Dev. (N. C.) 423; *Thomas v. Brown*, 10 Ohio, 247; *Dillinger's Appeal*, 35 Pa. 357; *Hitner's Appeal*, 54 Pa. 110.

¹ 4 Q. B. D. 661.

² In the discussion of the first of these two points, Brett, L. J., says: "If such insanity as existed here did not put an end to the agent's authority, it would be clear

that the plaintiff is entitled to succeed; but, in my opinion, insanity of this kind does put an end to the agent's authority. It cannot be disputed that some cases of change of status in the principal put an end to the authority of the agent; thus, the bankruptcy and death of the principal; the marriage of a female principal, all put an end to the authority of the agent. It may be argued that this result follows from the circumstance that a different principal is created. Upon bankruptcy the trustee becomes the principal; upon death the heir or devisee as to realty, the executor or administrator as to personality; and upon the marriage of a female principal her husband takes her place. And it has been argued that by analogy the lunatic continues liable until a fresh principal, namely, his committee, is appointed. But I cannot think that this is the true ground, for executors are, at least in some instances, bound to carry out the contracts entered into by their testators. I think that the satisfactory principle to be adopted is that, where such a change occurs as to the principal that he can no longer act for himself, the agent whom he has appointed can no longer act for him. In the present case a great change had occurred in the condition of the principal; he was so far affected with insanity as to be disabled from acting for himself; there-

In an action against a husband for necessities supplied to his wife, it appeared that the wife had committed adultery with the

fore his wife, who was his agent, could no longer act for him. Upon the ground which I have pointed out, I think that her authority was terminated. It seems to me that an agent is liable to be sued by a third person, if he assumes to act on his principal's behalf after he had knowledge of his principal's incompetency to act. In a case of that kind he is acting wrongfully. The defendant's wife must be taken to have been aware of her husband's lunacy; and if she had assumed to act on his behalf with any one to whom he himself had not held her out as his agent, she would have been acting wrongfully, and, but for the circumstance that she is married, would have been liable in an action to compensate the person with whom she assumed to act on her husband's behalf. In my opinion, if a person who has not been held out as agent assumes to act on behalf of a lunatic, the contract is *void** against the supposed principal, and the pretended agent is liable to an action for misleading an innocent person."

On the other question, the same learned judge says: "As between the defendant and his wife, the agency expired upon his becoming to her knowledge insane; but it seems to me that the person dealing with the agent without knowledge of the principal's insanity has a right to enter into a contract with him, and the principal, although a lunatic, is bound so that he cannot repudiate the contract assumed to be made upon his behalf. It is difficult to assign the ground upon which this doctrine, which however seems to me to be the true principle, exists. It is said that the right to hold the insane principal liable depends upon contract. I have a difficulty in assenting to this. It has been said also that the right depends upon estoppel. I cannot see that an estoppel is created. But it has been said also that the right depends upon representations made by the principal and entitling third persons to act upon them, until they hear that those representations are withdrawn. The authorities collected in Story on Agency, ch. 18, sec. 481, p. 610 (7th ed.), seem to base the right upon the ground of public policy: it is there said in effect that the existence of the right goes in aid of public business. It is, however, a better way of stating the

rule to say that the holding out of another person as agent is a representation upon which, at the time when it was made, third parties had a right to act. In this case the wife was held out as agent, and the plaintiff acted upon the defendant's representation as to her authority without notice that it had been withdrawn. The defendant cannot escape from the consequences of the representation which he has made; he cannot withdraw the agent's authority as to third persons without giving them notice of the withdrawal. The principal is bound, although he retracts the agent's authority, if he has not given notice and the latter wrongfully enters into a contract upon his behalf. The defendant became insane and was unable to withdraw the authority which he had conferred upon his wife; he may be an innocent sufferer by her conduct; but the plaintiff, who dealt with her *bona fide*, is also innocent, and where one of two persons, both innocent, suffers by the wrongful act of a third person, that person making the representation which, as between the two, was the original cause of the mischief, must be the sufferer and must bear the loss. Here it does not lie in the defendant's mouth to say that the plaintiff shall be the sufferer. A difficulty may arise in the application of a general principle such as this. Suppose that a person makes a representation which after his death is acted upon by another in ignorance that his death has happened: in my view the estate of the deceased will be bound to make good any loss which may have occurred through acting upon that representation. It is, however, unnecessary, to decide this point to-day. Upon the grounds above stated I am of opinion that, although the authority of the defendant's wife was put an end to by his insanity, and although she had no authority to deal with the plaintiff, nevertheless the latter is entitled to recover, because the defendant, whilst he was sane, made representations to the plaintiff upon which he was entitled to act until he had notice of the defendant's insanity, and he had no notice of the insanity until after he had supplied the goods for the price for which he now sues."

And see, on the same points, *Ryan v. Sams*, 12 Q. B. 460; 17 L. J. Q. B. 271; *Browne v. Joddrell*, Moo. & M. 105;

* "Void" is here again used where only voidable is meant. If void there could be no question as to "repudiating the contract." If he could repudiate it,

he could affirm it. The contracts of a lunatic, like those of an infant, or drunkard, at common law, are voidable and not void. See *ante*, p. 146, note.

connivance of her husband, and the husband subsequently turned her out of doors; that she had no means of support, and that the plaintiff supplied her with necessaries in question while she was living separate from her husband. The Queen's Bench Division held, under the maxim *volenti non fit injuria*, that the husband was liable for the necessaries furnished.¹

An order having been obtained in *Durrant v. Ricketts*² for leave to sign final judgment against a married woman, in an action against her for the price of goods supplied to her during coverture, but living apart from her husband, the order was set aside, inasmuch as there can be no judgment against a married woman personally in respect of such a claim; but an order was made for an inquiry as to her separate estate, and to declare that it was chargeable for the goods supplied.³

Baxter v. Earl of Portsmouth, 5 B. & C. 170; s. c. *nom.* *Bagster v. Earl of Portsmouth*, 7 D. & R. 614; *Molton v. Camroux*, 2 Ex. 487; *Dane v. Viscountess Kirkwall*, 8 C. & P. 679; *Niell v. Morley*, 9 Ves. 478; *Stead v. Thornton*, 3 B. & Ad. 357 n.; *Read v. Legard*, 6 Ex. 636; *Davidson v. Wood*, 1 De G. J. & S. 465; *Jenner v. Morris*, 3 De G. F. & J. 45.

The agency of the wife of a lunatic and the authority to pledge the husband's credit do not differ from those ordinarily implied from the relation of husband and wife; and where the wife receives sufficient money for all necessary purposes, including necessary repairs to her husband's house, the insane husband is not liable for such repairs made under the directions of his wife, any more than he would be if sane, and had given his wife money, and directed her to give the orders for the repairs and pay for them. *Richardson v. Dubois*, L. R. 5 Q. B. 51. See *Mizen v. Pick*, 3 M. & W. 471; *Baker v. Barney*, 8 Johns. 72; *Fenner v. Lewis*, 10 Johns. 38; *Mott v. Comstock*, 8 Wend. 544; *Cassy v. Patton*, 2 Ash. 140.

¹ *Wilson v. Glossop*, 19 Q. B. D. 379. See *Robinson v. Gosnold*, 6 Mod. 171; *Govier v. Hancock*, 6 T. R. 603; *Morton v. Fazan*, 1 B. & P. 226; *Hunt v. De Blaquièrre*, 5 Bing. 550; *Culley v. Charman*, 7 Q. B. D. 89; *Cox v. Kitchen*, 1 B. & P. 338; *Harris v. Morris*, 4 Esp. 41; *Mainwaring v. Leslie*, M. & M. 18; *Drew v. Drew*, 1 Notes of Eccl. Cas. 315; *Woodward v. Dowse*, 10 C. B. n. s. 722. In *Robinson v. Gosnold*, 6 Mod. 171, Holt, C. J., is quoted as saying: "Let the woman be ever so vicious, yet while she will cohabit with her husband he is bound to provide necessaries for her, and is liable to the actions of such persons as furnish her with them; for his bargain was to

take her for better or worse. In like manner it is if the husband turns his wife away for her wickedness, he remains still chargeable for her necessaries." And in *Manby v. Scott*, 1 Keb. 69; Sid. 109; 1 Lev. 4, Hale, C. B., says: "Also, if the wife cohabit with her husband, and is ever so lewd, he shall be liable for her maintenance; for he took her for better for worse; so, if he runs away from her, or turns her away, or forces her by cruelty or ill usage to go away from him." Again, in *Hunt v. De Blaquièrre*, 5 Bing. 550, 557, Best, C. J., says: "If a man turns his wife out of doors, it has been said by judge after judge that he sends her forth with an implied credit for necessaries. This is the general law; and the husband is liable under it, unless the obligation cast on him by turning his wife out be discharged by something subsequent." And Cave, J., in *Wilson v. Glossop*, 19 Q. B. D. 379, 381; "But, however this may be, it is at all events admitted that a husband has no right to turn his wife out of doors under circumstances that would not disentitle her to succeed in an action for restitution of conjugal rights." And see *Bac. Ab., Baron & Feme* (H); *Seaver v. Seaver*, 2 Sw. & Tr. App. 2, p. 665; *Hope v. Hope*, 1 Sw. & Tr. 94; *Rex v. Flintan*, 1 B. & Ad. 227.

² 8 Q. B. D. 177.

³ See *Pickard v. Hine*, L. R. 5 Ch. 274; *Pike v. Fitzgibbon*, 17 Ch. Div. 454; *Collett v. Robinson*, 11 Ch. Div. 687; 26 W. R. 405; *Atwood v. Chichester*, 3 Q. B. D. 722.

But there is one case where the wife shall sue and be sued as a *feme sole*, viz., where the husband has abjured the realm or is banished, for then he is dead in law; and the husband being thus disabled to

The legal expenses incurred by a deserted wife, preliminary and incidental to a suit for restitution of conjugal rights, in obtaining

sue for or defend the wife, it would be most unreasonable if she had no remedy or could make no defence at all. 1 Blk. Com. 443. And Coke says: "A wife is disabled to sue without her husband as much as a monk is without his sovereign. And yet we read in books that in some cases a wife has had ability to sue and be sued without her husband, for the wife of Sir Robert Belknap, one of the justices of the Court of Common Pleas, who was exiled or banished beyond sea, did sue a writ in her own name, without her husband, he being alive." And there was a similar case in the reign of Edward I.: that of the wife of Thomas Weyland, who had been abjured the realm for felony, on which Coke remarks: "And so it is, if by act of parliament the husband be attained of treason or felony, and saving his life is banished forever, as Belknap was, this is a civil death, and the wife may sue as a *feme sole*;" and concludes that an abjuration of the realm was equivalent in some respect to a divorce between husband and wife, remitting her to the rights and liabilities of *feme sole*. Co. Litt. 133. And see Vin. Ab. 152, 153, where the cases support the exception, in cases of exile or banishment for a limited time, and also where the husband was an alien beyond sea. The exception has been applied in this country in all cases where the husband has abandoned or deserted his wife and accepted an abode or residence in another State or jurisdiction. In the application of this exception the States are regarded as foreign and separate jurisdictions. Abbott v. Bayley, 6 Pick. 89; Gregory v. Peirce, 4 Met. 78; Gregory v. Paul, 15 Mass. 31; Beane v. Morgan, 4 McCord, 148; Rhea v. Rhenner, 1 Pet. 100; Cornwall v. Hoyt, 7 Conn. 427; Clark v. Valentine, 41 Ga. 143; Love v. Moynahan, 16 Ill. 277; Rose v. Bates, 12 Mo. 33; Zallagher v. Delargy, 57 Mo. 37; Musick v. Dodson, 76 Mo. 624; Danner v. Berthold, 11 Mo. App. 351; Roland v. Logan, 18 Ala. 307; Osborn v. Nelson, 59 Barb. 357.

In the late case of Phelps v. Walther, 78 Mo. 320, it was held that the common-law principle prevailed in Missouri, and that the statute there providing generally, with exceptions only not applicable to this point, that when a married woman is a party to her suit her husband must be joined with her, did not take away from her rights to sue in her own name in the common-law exceptional cases. And in the same State, in the still more recent case (A. D. 1886) of Morris v. Bohle, 19 Mo. App. 529, under the statute provid-

ing, in effect, that when the husband, without good cause, abandons his wife, and refuses or neglects to maintain her, she is entitled to her earnings, it was held that where her husband was confined in a lunatic asylum she could sustain an action in her own name for her earnings. But the abandonment and failure to support must concur in order to give the action. State v. Staffens, 16 Mo. App. 553; State v. Russell, *Ibid.* 16; State v. Bruner, *Ibid.* 274; State v. Seller, 17 Mo. App. 39. So that, though the husband abandon his wife, while she is living on means provided by him, such right does not accrue. State v. Fuchs, 17 Mo. App. 458.

In Maine, too, it has been held, where the defendant was a married woman, deserted by her husband, who had left the State, that as she was thus enabled to make express or implied contracts for her support, which would be binding on her as if sole, so that any person furnishing her needful supplies at her request could maintain an action therefor against her, despite her coverture, that an action would lie against her by the town for pauper supplies furnished her. Inhabitants of Peru v. Poland, 78 Me. 215. And see Brewer v. East Machias, 27 Me. 495; Cutler v. Maker, 41 Me. 594; Deer Isle v. Eaton, 12 Mass. 328; Kennebunkport v. Smith, 22 Me. 449; Augusta v. Kingfield, 36 Me. 239; Lewiston v. Harrison, 69 Me. 504; New Bedford v. Chace, 5 Gray, 28.

In Montana, in Palmer v. McMasters, 6 Mont. 169, in an action by a married woman for the recovery of property, which she alleged belonged to her, taken in execution against her husband, she claimed that he had deserted his wife and left the territory, leaving her in destitute circumstances, and, therefore, that the abandoned wife had a right to maintain the action at common law, not having brought herself within the protection of the Married Woman's Act of Montana. The court said: "We think a married woman who has been deserted and abandoned by her husband should be treated as a *feme sole*, and subject to sue and be sued as such. This was so at common law, if the husband had abjured the realm, and there is not much practical difference, so far as the wife is concerned, whether her husband abandons her by abjuring the realm or deserts her by departing the territory of Montana. It is not of vital importance whether the desertion is called abjuration or abandonment." The court held, that while desertion of the wife by the hus-

counsel's opinion on the effect of an antenuptial agreement for a settlement; in obtaining professional advice as to the proper mode of dealing with tradespeople, who were pressing her to pay them for various necessary articles supplied to her since she had been deserted; and also of preventing a distress threatened on furniture belonging to her husband, in the house she occupied, — are necessities for which she has implied authority to pledge his credit during his lifetime, and for which after his death his executors are therefore liable.¹

A solicitor employed by a wife to take proceedings against her husband to obtain a divorce on the ground of cruelty and adultery, may sue the husband for "extra costs," *i. e.*, costs reasonably incurred by him beyond the costs taxed and allowed, as between party and party. His common-law right to sue the husband for these as for "necessaries" supplied to the wife, is not to be limited to the statutable rights and remedies given to the wife under the divorce acts.²

In an action to recover the value of necessities supplied by the plaintiff to the wife of the defendant, whilst living apart from him, the answer set up by the defendant under a plea of never indebted, was that the agency of the wife was destroyed by the circumstance of her having in a suit in the divorce court been found guilty of adultery. To establish this, the proceedings in the suit were put in, from which it appeared that the adultery of the wife with the co-respondent had been established, but that

band removes the disabilities of coverture, and authorizes the wife to act as a *feme sole*, yet the removal of this disability should be alleged and proved, because the fact of marriage raises the presumption that the disabilities still exist. See an elaborate judgment in *Peck v. Marling*, 22 W. Va. 703, where, with reference to an action in West Virginia against the administrator of a married woman, for costs and expenses of obtaining a divorce from her husband, it being alleged that at the time the contract was made the intestate was living separate and apart from her husband, the court said: "Would the fact that when the contract was made she was living separate and apart from her husband vary the case and render such contract valid against her in a court of law? At common law her contract would, in a court of law, be regarded as invalid and null as against her, when made while living separate and apart from her husband, precisely as it would be if she were living with him." But the court held that the statute of the State, enabling a married woman, living separate and apart from her husband, to carry on business in her own name, and making the issue her separate

property, had changed the common law, and made a married woman living separate and apart from her husband liable to be sued, notwithstanding her coverture. See *Frecking v. Rolland*, 53 N. Y. 422, 425; *Adams v. Hermess*, 62 Barb. 336; *Plumer v. Lord*, 5 Allen, 460; *Holmes v. Holmes*, 4 Conn. 117, 120; *Chapman v. Briggs*, 11 Allen, 546; *Proper v. Cobb*, 104 Mass. 539, 590.

¹ *Wilson v. Ford*, L. R. 3 Ex. 63. See *Brown v. Ackroyd*, 5 E. & B. 819; *Ladd v. Lynn*, 2 M. & W. 265.

² *Ottaway v. Hamilton*, 3 C. P. D. 393, by the Common Pleas Division; affirmed on appeal by the Court of Appeal; *Ibid.* 398. See also *Turner v. Rookes*, 10 A. & E. 47; *Brown v. Ackroyd*, 5 E. & B. 819; *Rice v. Shepherd*, 12 C. B. n. s. 332; *Re Hooper*, 33 L. J. Ch. 300; *Dickens v. Dickens*, 2 Sw. & Tr. 103; *Stocken v. Patrick*, 29 L. T. 507; *Wells v. Wells*, 1 Sw. & Tr. 308; *Allen v. Allen*, 2 Sw. & Tr. 107; 30 L. J. P. & D. 9; *Bremner v. Bremner*, L. R. 1 P. & D. 254; *Jones v. Jones*, L. R. 2 P. & D. 333; *Flower v. Flower*, L. R. 3 P. & D. 132; *Norman v. Villars*, 2 Ex. Div. 359.

there was no decree of dissolution of marriage, by reason of the finding of the jury that her husband also had been guilty of adultery. The court held that the judgment of the divorce court had not altered the *status* of the parties. The woman still continued the wife of the defendant. There was nothing in the case in the divorce court but the mere verdict of a jury, binding as between the parties to the suit, but it was not an estoppel as against other parties who came to litigate the same question. The verdict against the defendant was, accordingly, sustained.¹

A person who has advanced money to a married woman deserted by her husband, and which has been actually applied towards her support, is entitled in equity, though not at law, to recover such sums from the husband.²

¹ Needham v. Bremner, L. R. 1 C. P. 583. But a sentence in a matrimonial court is conclusive, for it is an adjudication upon the *status* of the parties. *Da Costa v. Villa Real*, 2 Str. 961; *Bunting's Case*, 4 Co. R. 29 a; *Kenn's Case*, 7 Co. R. 42 b; *Meddowcroft v. Huguenin*, 4 Moo. P. C. 386; *Perry v. Meddowcroft*, 10 Beav. 122; *Phillips v. Burg*, 2 T. R. 346. See as to estoppel in such case, *Outram v. Morewood*, 3 East, 346; *Hannaford v. Haron*, 2 C. & P. 148; *General Steam Navigation Co. v. Guillon*, 11 M. & W. 877; *The Duchess of Kingston's Case*, 2 Sm. L. C. 663 *et seq.*; *Steph. on Plead.* (5th ed.) 173; *Rose. Ev.* (10th ed.) 157, 167.

² *Deare v. Soutten*, L. R. 9 Eq. 151; *Harris v. Lee*, 1 P. Wms. 482; *Jenner v. Morris*, 1 Dr. & Sm. 218; 3 De G. F. & J. 45; *Hutchinson v. Standley*, Ann. Reg. 1776, cited in *Deare v. Soutten*, L. R. 9 Eq. p. 152. *May v. Skey*, 16 Sm. 588, holding the reverse, is overruled by *Jenner v. Morris*, 3 De G. F. & J. 45. See *Grindell v. Godmond*, 5 A. & E. 755; *In re Ford*, 32 Beav. 621; *Rawlins v. Vandyke*, 3 Esp. 250.

Professor Parsons says on this subject: "Whether a married woman can borrow money, even for necessities, and her husband be held liable on his implied authority, seems not to be settled." 1 Pars. on Con. (7th ed.) 392. On the contrary, we think the law, both in England and America, is thoroughly well settled, and is as is above laid down by us. As to the law in England see the above-cited cases, in which the law is clearly laid down as we have stated it. Thus in *Jenner v. Morris*, 1 Dr. & Sm. 218, 3 De G. F. & J. 45, 51, Lord Campbell says on the point: "An action at law could not be maintained for such a claim. Those who supply the necessities to the deserted wife may sue the husband at law, she being considered his agent

with uncountermandable authority to order the necessities on his credit. But courts of law will not recognize any privity between the husband and a person who has supplied his wife with money to purchase necessities, or pays the tradespeople who have furnished them. Nevertheless, it has been laid down from ancient times that a court of equity will allow the party who has advanced the money which has proved to have been actually employed in paying for necessities furnished to the deserted wife, to stand in the shoes of the tradespeople who furnished the necessities, and to have a remedy for the amount against the husband." And as far back as A. D. 1718 it was decided that, admitting the wife cannot at law borrow money, though for necessities, so as to bind the husband, yet this money being applied to the use of the wife for her cure and for necessities, the plaintiff that lent this money must in equity stand in the place of the persons who found and provided such necessities for the wife. And, therefore, as such persons would be creditors of the husband, so the plaintiff shall stand in their place and be a creditor also; and it was ordered that the husband's trustees should pay him his money and likewise his costs. *Harris v. Lee*, 1 P. Wms. 482. And again: If a tradesman trust a married woman for necessities he shall recover against the husband, so far as the goods taken up appear to be necessary, according to the degree and quality of the husband; but if a man lends a married woman money to buy necessities, and she does so, he has no remedy against the husband; and this was agreed to be a settled distinction (A. D. 1718) in *Scott and Manby's Case* and other cases [at law, *Auth.*]; and therefore the plaintiff, who in this case has supplied the woman with money in her necessities, and now brought his bill against the husband's executors for a dis-

4. MARRIED WOMEN BINDING THEIR SEPARATE ESTATE.

The separate estate of married women against which the rights and remedies of their creditors exist and can be enforced, is the

covery of assets, and a satisfaction thereof of his debt, could have no relief, though the utmost unkind and cruel usage of the husband was proved, and that the money lent was actually laid out and applied for necessities. But yet the Master of the Rolls said the plaintiff should stand in the place of the tradesmen of whom such necessities were bought (*Mich.* 1718, *Anon.*, MS. Rep. Prec. in Chan. 502), and be let in for a satisfaction for so much as he could prove to have been advanced or delivered to her by them as necessities, as they themselves should have been if they had been plaintiffs, but for nothing more. s. c. Prec. in Ch. 502, 503. The same principle was applied in *Marlow v. Pitfield*, 1 P. Wms. 558, 559, to the strictly analogous case of an infant, where it was held that though the law be that if one actually lend money to an infant, even to pay for necessities, yet as the infant in such case may waste and misapply it, he is therefore not liable. It is, however, otherwise in equity; for if one lends money to an infant to pay a debt for necessities, and in consequence thereof the infant does pay the debt, here, although he may not be liable at law, he must, nevertheless, be so in equity; because in this case the lender of the money stands in the place of the person paid, viz., the creditor for necessities, and shall recover in equity, as the other should have done at law. This has been the well-settled law ever since, the only exception being the overruled case of *May v. Skey*, 16 Sim. 588. The case of *May v. Skey*, which was decided by Shadwell, V. C., was, in *Hirst v. Tolson*, 16 Sim. 620, 623, put by the same judge on an entirely untenable basis; and the case was expressly overruled by Jenner v. Morris, 3 De G. F. & J. 45, 53; Lord Chancellor Campbell saying of it: "One adverse case was cited which I must notice, — *May v. Skey*, 16 Sim. 588. — the marginal note being, 'A. having gone abroad and left his wife unprovided for, the plaintiff lent her money to purchase necessities, and she applied it accordingly, — *Held*, that the plaintiff could not sue A. for the money in a court of equity.' But it appears that the vice-chancellor, who decided that case, not holding that there was not a debt due from A. to the plaintiff which might be recovered, proceeded upon the notion that this was a *legal* debt, the payment of which could not be directed by a court of equity. His Honor more fully explains this as his *ratio decidendi* in the

subsequent case of *Hirst v. Tolson*, 16 Sim. 623. But this is clearly erroneous. That no action at law could be maintained for such a demand was considered too clear for argument in the recent case of *Knox v. Bushell*, 3 C. B. N. s. 334." The case seems to us to be put by Shadwell, V. C., in *Hirst v. Tolson*, 16 Sim. 623, on a still more untenable ground than as stated by Lord Campbell in *Jenner v. Morris*, 3 De G. F. & J. 45, 53. The ground upon which Shadwell, V. C., seems to us, in *Hirst v. Tolson*, 16 Sim. 623, to put the cases of *May v. Skey* and *Hirst v. Tolson* was simply that in the former case the bill was filed *against the husband himself*, and in the latter case it was filed *against his executors*; i. e., that such a bill would lie against the husband's executors after his death, but would not lie against the husband himself during his lifetime. This position being so utterly untenable, it is not strange that a slightly less untenable basis was sought for it in *Jenner v. Morris*, 3 De G. F. & J. 45, 53. But the ground of the decision seems to us clearly stated, thus: "In *May v. Skey*, 16 Sim. 588, a lady had advanced money to a married woman (whose husband had gone abroad and left her wholly unprovided for) to enable her to procure clothes and other necessities; and the lady sued *the husband* [the italics are his own] for the money. In the course of the argument two cases were cited in which the court had ordered money advanced under similar circumstances to be repaid. But in each of those cases *the husband was dead*, and the suit was against his assets. In *May v. Skey*, however, *the husband was alive*, and, therefore, I held that *the bill would not lie*. In this case, there being a debt, and payment of it being sought out of the assets of a person who is dead [i. e., a bill filed against his executors], I am clearly of opinion that it is a case in which this court has jurisdiction."

Shadwell, V. C., does not intimate that the bill in equity against the living husband was not sustained because an action at law would lie against him; nor does he state or imply that an action at law would lie against the husband, but not against the executor; but what he does expressly hold is, that a bill would not lie against the living husband, but after the death of the husband it would lie against his executors, because they have assets on which the court can act. But how the fact of the assets being in

creature of courts of equity, and such rights and remedies themselves, therefore, can exist and be enforced in those courts only.

the hands of the executor would sustain a claim in equity which could not be sustained against his testator does not satisfactorily appear. By every analogy, an action at law would as well lie against an executor having assets as it would have lain against his testator; and any claim against the estate of the testator which could only be enforced by a bill in equity could as well be enforced by similar bill against the testator in his lifetime. However, whether the *ratio decidendi* of *May v. Skey*, 16 Sim. 588, as distinguished from *Hirst v. Tolson*, 16 Sim. 623, is as stated by Lord Campbell in *Jenner v. Morris*, 3 De G. F. & J. 45, 53, or as it presents itself to us, it is entirely untenable, and has been, we think, properly overruled and repudiated in all the later cases.

Lord Justice Turner stated a much sounder principle (as we think, with all deference to Lord Campbell) than that relied upon by Shadwell, V. C., of the ability of the court to control the assets, as follows:—

“It is an ancient head of the jurisdiction of this court to interpose in cases in which the principle of the law gives a right, but the forms of law do not give a remedy. Now what is the case here? It is beyond question that the principle of law is that the husband deserting his wife is liable for necessities supplied to her; but it is equally beyond question that if money be advanced to the wife to purchase necessities, the money, although in fact so applied, cannot be recovered at law, because, according to the necessary form of action for the recovery of the money, the court of law cannot look behind the advance and enter into the application of the money. It seems to me, therefore, that the old cases are well founded in the principles of the court of equity, and that we are bound to follow them.” *Jenner v. Morris*, 3 De G. F. & J. 45, 55, affirming the judgment: s. c. 1 Dr. & Sm. 218. See, also, *Re Ford*, 22 Beav. 621, where an annuity was granted to a wife who was deserted by her husband, and supported by her sister, and which was ordered to be paid to the sister in exclusion of the husband. And see *Guy v. Pearkes*, 18 Ves. 196.

The same principle, both as to married women and infants, has been repeatedly held in England in the courts of law. See *Darby v. Boucher*, 1 Salk. 279; *Earle v. Peale*, 1 Salk. 386; *Stone v. Macnair*, 1 Moo. 126; *Grindell v. Godmond*, 5 A. & E. 755; *Probart v. Krouth*, 2 Esp. 472; *Knox v. Bushell*, 3 C. B. N. S. 334. In this last case, Crowder, J., where it

was decided that a husband is not liable at law for money lent to his wife, though it was afterwards applied by her in procuring necessities, for the supply of which he would have been liable, asked Shee, Serjt., whether he had any authority that money lent to the wife, though for a specific purpose, could be recovered in an action against the husband; and the counsel was forced to admit that there was no such case at law, but that there was in equity.

What makes the mistake of Prof. Parsons in the matter more remarkable is, that in the well-known and well-decided case of *Walker v. Simpson*, 7 W. & S. 83, decided in this country nearly fifty years ago, where the English cases were cited and approved, the same principles to which we have referred were distinctly enunciated, on a question of set-off to a claim by the husband on a bond, thus:—

“Though it be true that a husband is bound to provide his wife with necessities suitable to her situation and his condition in life, and if he abandons her or turns her away without reasonable or just cause and without any provision for her maintenance, he becomes liable for her necessities and sends credit with her to that extent, yet he is not liable for money lent to her, unless it be done at his request, which must be averred and shown. So, in regard to an infant, if money be lent to him, and he lay it out in necessities, he is not liable for it at law. It is only for necessities furnished to the infant that he can be made liable at law, and not for money lent or advanced, though he may have used it for the purpose of procuring necessities. And so in the case of a husband, he can only be made liable at law for necessities furnished to his wife, and not for moneys advanced or lent to her, notwithstanding she may have laid it out in procuring necessities. . . . Had the defendant supplied the plaintiff's wife with necessities, instead of money, suitable to her situation and the condition of the plaintiff in life, and have shown this on the trial of the cause, together with the fact that the plaintiff had without sufficient cause compelled her to separate herself from him, he might have defalcated the price thereof from the amount of the bond. Or if he had shown that under such circumstances the money advanced by him to her had been applied to the payment of such necessities purchased for her use, he might, upon principles of equity, have been permitted to have stood in the place of the creditor for necessities,

For courts of law recognize in married women no separate existence, no power to contract, and, except for some collateral and

and to have defalcated the money advanced from the amount due on the bond. All this is required of the party who undertakes to furnish the wife necessaries or money to pay for the same while in a state of separation from her husband. For although the husband is to blame for having caused the separation, yet he is only chargeable at law for necessaries supplied to his wife at her request, and not with money lent or advanced to her, because money cannot be considered necessaries, which consist of food, lodging, and raiment. But where the money lent or advanced has been applied to the payment of necessaries furnished to her, equity will put the party lending or advancing the money in the place of the party who supplied the necessaries." So that, in this country, such proceedings would have to be in equity in such of the States as have not given equitable jurisdiction to the common-law courts.

The same principle is established in Connecticut in the late case of *Kenyon v. Farris* (A. D. 1850), 47 Conn. 510, where a bill in equity was filed to recover money advanced to the wife of the respondent for the purchase of necessaries by her while deserted by her husband, which, on demurrer, was dismissed by the Superior Court. But on error to the Supreme Court of Errors the judgment was reversed, and the bill was sustained. We know of no decision in this country which is *contra* to these well-decided cases. In *Gill v. Read*, 5 R. I. 343, 347, after stating the principle that neither a wife nor an infant has credit to borrow money, — the credit being for necessaries, and not for money to buy them with, — which may be misapplied, this distinction is made, that if the lender lays out the money, or sees it laid out for necessaries, he may charge them as provided by himself; and thus the application of the loan is left, as it should be, at his peril. The same principle is laid down in *Earle v. Peale*, 1 Salk. 386, where it was held that a *feme covert* may buy necessaries, and her act shall make the husband chargeable; but she cannot borrow money to lay out for necessaries. So it is of an infant. He may buy necessaries, but he cannot borrow money to buy, for he may misapply the money; and therefore the law will not trust him but at the peril of the lender, who may lay it out for him, or see it laid out, and then it is his providing, and his laying out so much money for necessaries for him.

And *assumpsit* will lie for a loan to the

wife at the request of the husband. *Stevenson v. Hardie*, 2 W. Blk. 872. So where the declaration was for meat, etc., furnished by the plaintiff at the defendant's request, and the evidence was that it was furnished to the defendant's wife, at his request, in his absence, it was held that a delivery to the wife at the husband's request is a delivery to the husband. *Ross v. Noel*, Bull. N. P. 136. See Bac. Ab. *Assumpsit*, F.; Com. Dig. *Baron et Feme*, A. And in Pennsylvania it has been held, under their Acts of 1718 and 1855, that a married woman could herself obtain an attachment against her husband's property for money expended by her for the support of herself and children on his desertion of them, and could have against him therefor the same remedies at law as a *feme sole*. *Reilley v. Reilley*, 4 Brewst. 169. And see *Burke v. Wenkle*, 2 S. & R. 19.

There is another question closely connected with that of the ability of one who has lent or advanced money to a married woman to buy necessaries, to recover therefor from her husband, of much greater nicety than that is, and in connection with which the conflict in the authorities, in both England and America, is unquestionable. It is as to the right of the wife, independent of the statutes passed for her relief, to compel her husband, by proceedings in equity, to provide for her maintenance, outside of any application for divorce. It is stated in some of the text-books (see 2 Sto. Eq. Jur. § 1422), and in some of the cases, that the doctrine held in England is, that the obligation of the husband to provide a suitable maintenance for his wife is not a duty of which courts of equity will decree the specific performance, by requiring him to furnish a separate maintenance. That the remedy is in the courts of law, by action against the husband, in favor of any one who may, under such circumstances, have supplied the wife with necessaries suitable to her condition in life; that the jurisdiction of decreeing alimony belongs to the spiritual court, and can be properly exercised in that court as incidental to a decree of divorce only, and is not within the jurisdiction of a court of equity. Nicely *v. Nicely*, 3 Head (Tenn.), 184, 186. But it is added in this case: "Such seems to be the general doctrine of the English cases, though the cases upon this subject do not altogether agree." It was further said in that case: "But in some of the American courts a more reasonable doctrine has prevailed; and the jurisdiction of a court of equity in such cases has

incidental purposes, no possession or enjoyment of property separate and apart from their husbands. They deny to married

been maintained upon general principles, and especially upon the utter inadequacy of the remedy at law." The court expressed their intention, had it been necessary to have done so, to have followed the holding in those cases; but they decided that in Tennessee this power was expressly conferred on courts of equity by statute, — Act of 1835, ch. 26, §§ 18 and 19; *Nicely v. Nicely*, 3 Head, 184.

Although the English cases are generally to the effect as stated in *Nicely v. Nicely*, 3 Head, 184, there are cases in England where the court, having control of funds to which the husband was entitled, has laid hold of such funds, and compelled the husband to make suitable provision for the support of the wife out of such funds, and in other cases has granted alimony where such a state of affairs does not seem to have existed. See *Lashbrook v. Tyler*, 1 Ch. R. 24; *Ashton v. Ashton*, *Ibid.* 87; *Russell v. Bodwill*, *Ibid.* 99; *Whorwood v. Whorwood*, *Ibid.* 118; *Nichols v. Danvers*, 2 Vern. 761; *Oxenden v. Oxenden*, *Ibid.* 493; *Angier v. Angier*, Gilb. Ch. 152; *Williams v. Callow*, 2 Vern. 752; *Watkins v. Watkins*, 2 Atk. 96; *Bullock v. Menzies*, 4 Ves. 798; *Guth v. Guth*, 3 Bro. C. C. 614; *Wright v. Morley*, 11 Ves. 20; *Duncan v. Duncan*, 19 Ves. 394.

In a very old case (A. D. 1706), *Oxenden v. Oxenden*, Gilb. Ch. 1; 2 Vern. 493, it was objected that the court had no jurisdiction in the case of alimony; but counsel said, to which the Lord Keeper agreed, "that this was as proper, if not a properer, Place than the Spiritual Court; For the Spiritual Court has only a consequential Jurisdiction for Alimony, always subsequent to a Separation, unless *pro misis & expensis*, and a present Subsistence; but this Court has an original Jurisdiction, or at least a concurrent Jurisdiction with the Spiritual Court, as in the Cases of Legacies, Probates, &c. But the Lord Keeper said this Court could neither separate *a Mensa & Thoro*, nor *a Vinculo*; these being matters merely spiritual." But in *Angier v. Angier*, Gilb. Ch. 153, it was said, that "tho' this Court *could not decree Alimony*, yet it might decree Execution of Articles according to the Parties' own Agreement; and several Precedents had been in this Court to that Purpose, as Sir James Oxenden and his Lady, and a case of Cutting and Cutting, and several other Cases. My Lord Chancellor was of the Same Opinion, and said, to decree an Execution of Performance of these Articles, was not to invade the Juris-

diction of the Spiritual Court." And in *Whorwood v. Whorwood*, 1 Ch. R. 118, the judges certified in Mich. Term, 1662, that decrees for alimony made in the Court of Chancery "in the late times" were confirmed by the act for confirmation of judicial proceedings. And this is explained by Lord Loughborough, in *Legard v. Johnson*, 3 Ves. 359, thus: "Soon after the civil war there had been a decree by the Lords Commissioners. There being no Ecclesiastical Court, the jurisdiction, some way or other, got there." The case, however, of *Oxenden v. Oxenden*, Gilb. Ch. 1, referred to above, was long subsequent to this. But there is no doubt that for a long period back no such jurisdiction has been exercised in the English courts. See *Ball v. Montgomery*, 2 Ves. 191; *Legard v. Johnson*, 3 Ves. 352; *Mildmay v. Mildmay*, 1 Vern. 53; *Hincks v. Nelthorpe*, *Ibid.*, 204; *Head v. Head*, 3 Atk. 547; *Duncan v. Duncan*, 19 Ves. 394. In *Head v. Head*, 3 Atk. 547, 550, Lord Hardwicke said: "I do not find that this court ever made a decree to compel a husband to pay a separate maintenance to his wife unless upon an agreement between them, and even upon this unwillingly."

In this country the courts in some of the States have assumed such jurisdiction in chancery, while others have refused to exercise it. In some of the cases where such jurisdiction has been assumed, it has been claimed on the ground of avoiding circuity of action. Equity, however, never obtains a special jurisdiction on that ground. Another ground taken is that inasmuch as the system of spiritual courts as in England was not adopted in this country, chancery, in this country, possesses all the powers of the spiritual courts in England. To this it might be replied that even in the spiritual courts alimony was never granted, except either *pendente lite* on an application for a divorce, or as incidental to a divorce on that being granted; whereas, in this country, where the equity courts claim the right of granting the wife a separate maintenance, it is not as an incident to a divorce, but on an independent application. It seems clear that there is no well-decided case in England in which a separate maintenance was granted to a wife out of her husband's estate, either by the ecclesiastical or equity courts, on a simple application for such separate maintenance, as has been repeatedly done in this country. In *Duncan v. Duncan*, 19 Ves. 394, 397, Sir Wm. Grant says, quoting Lord Loughborough: "It is contrary to the es-

women both the power to contract and the power to enjoy. Courts of equity, on the other hand, have, through the medium of

established doctrine, that a married woman should be a plaintiff in a suit in this court for separate maintenance; taking it now to be the established law, that no court, not even the ecclesiastical court, has any original jurisdiction to give a wife a separate maintenance. It is always as incidental to some other matter that she becomes entitled to a separate provision; as if she applies in this court for a *supplicavit* for security of the peace against her husband, and it is necessary she should live apart. As incidental to that, the chancellor will allow her separate maintenance: so in the ecclesiastical court, if it is necessary for a divorce *a mens et thoro propter sevitiam*. See *Ball v. Montgomery*, 2 Ves. 191, 195, *per* Lord Loughborough.

In this country, in Massachusetts, an application was made for alimony, in connection with an application for a *supplicavit*, and was refused. *Adams v. Adams*, 100 Mass. 365. The court held that it never was the direct object of the writ of *supplicavit* to give alimony, and that an attempt to use the process for the direct purpose of obtaining alimony to enable the wife to have a permanent separate maintenance was an abuse of the writ. And see *Codd v. Codd*, 2 Johns. Ch. 141, *per* Chancellor Kent. But in *Prather v. Prather*, 4 Desaus. (S. C.) 33, a separate maintenance was decreed on an application for that writ. In Georgia it has been held that jurisdiction over divorce and alimony has been given by statute to the common-law courts, and that, therefore, they succeed to the powers which were exercised in England over such matters by the ecclesiastical courts, and that the courts of chancery have no jurisdiction to grant alimony, either permanent or *pendente lite*. *McGee v. McGee*, 10 Ga. 478. It has also been held in North Carolina, that as no statutory provision has been made for it, the courts in that State have no power to grant alimony *pendente lite*. *Wilson v. Wilson*, 2 Dev. & B. (L.) 377. In Texas, too, an application for separate maintenance has been refused where the wife was not seeking for a divorce. *Trevino v. Trevino*, 63 Tex. 650. And see a very valuable dissenting opinion, with which we entirely concur, by Sprague, J., in *Gallaud v. Gallaud*, 38 Cal. 265, 272, with which Sanderson, J., concurred. And see a most elaborate judgment on the subject, by Parker, C. J., in 9 N. H. 309, 317, where the question is very ably discussed by that profound lawyer, and where it was held that the court of chan-

cery had no jurisdiction to grant alimony, which term, says the learned chief justice, "as generally used in the English books, means a portion or sum allotted to the wife for her maintenance, from year to year, either during a matrimonial suit or upon a divorce. 1 Bl. Com. 441; *Cooke v. Cooke*, 2 Phill. Ec. 40; *Street v. Street*, 2 Addams' Ec. 1; *Hamerton v. Hamerton*, 1 Hagg. Ec. 23; *De Blaquière v. De Blaquière*, 3 Hagg. 322. And it has been held that it shall be sued for in the spiritual courts, and not in chancery. 2 Shower, 290. It may be allotted *pendente lite*." The case referred to from Shower was decided after the restoration (34 & 35 Car. 2), Anonymous Case, 269, where it was held that "the chancery will allow of demurrer to such bills for alimony." And see 2 Com. Dig., Chancery (2 D). The law has been, in effect, so decided, also, in Indiana. *Fischli v. Fischli*, 1 Blackf. 360; *Chapman v. Chapman*, 13 Ind. 396. And in Mississippi. *Lawson v. Shotwell*, 27 Miss. 630, 633. (But see *Porter v. Porter*, 41 Miss. 116; *Garland v. Garland*, 50 Miss. 694; *Dewees v. Dewees*, 55 Miss. 315; *Verner v. Verner*, 62 Miss. 260, under the Mississippi statutes.) And in Missouri. *Doyle v. Doyle*, 26 Mo. 545, 549. In Michigan. *Peltier v. Peltier*, *Harrington*, Ch. 19, 29. And in New Jersey. *Yule v. Yule*, 10 N. J. Eq. 138, 145; independent of their statute. *Cory v. Cory*, 11 N. J. Eq. 400. See, also, *Perry v. Perry*, 2 Paige, 501; *Mix v. Mix*, 1 Johns. Ch. 108; *Lewis v. Lewis*, 3 Johns. Ch. 519; *Shannon v. Shannon*, 68 Mass. 285; *Harrington v. Harrington*, 10 Vt. 505; *Wilson v. Wilson*, 2 Dev. & B. 377; *Helms v. Francisus*, 2 Bland, 565; *Crane v. Meginnis*, 1 Gill & J. 463, 474; *Drumcock v. Drumcock*, 3 Md. Ch. 140, 142, *et seq.* We think the weight of reason and authority is with this holding; but as the question is one degree farther removed from the law of Sales than where a third party has advanced money to the wife for the express purpose of purchasing necessities, we do not here pursue the question further, except to cite some of the American authorities in which the opposite, and what we think is the incorrect doctrine on the subject, has been held. See *Gallaud v. Gallaud*, 38 Cal. 265; *Butler v. Butler*, 4 Litt. (Ky.) 202; *Whitecomb v. Whitecomb*, 46 Iowa, 437; *Graves v. Graves*, 36 Iowa, 310; *Farber v. Farber*, 64 Iowa, 362, under the Iowa statute. (But see *O'Hagan v. O'Hagan*, 4 Iowa, 516, 517; *McMullen v. McMullen*, 412, 414, *contra*; *Nicely v. Nicely*, 3 Head

trusts, created for married women rights and interests in property, both real and personal, separate from and independent of their husbands. To the extent of the rights and interests thus created, whether absolute or limited, a married woman has in courts of equity power to alienate, to contract, and to enjoy. In fact, she is considered in a court of equity as a *feme sole* in respect of property thus settled or secured to her separate estate. It is from this position of married women, and from the rights and powers incident to it, that the claims of creditors against separate estates of married women have arisen.¹

The cases are very numerous which have established that the bonds, bills of exchange, and promissory notes of married women are payable out of their separate estate.²

The separate property of a married woman is also bound for her general engagements, if it appears that such engagements were made with reference to and upon the faith or credit of that estate, and whether it was or not is a question to be judged of by the court upon all the circumstances of the case.³

(Tenn.), 184, 186; *Purcell v. Purcell*, 4 Hen. & M. 507, 509; *Almond v. Almond*, 4 Rand. 662; *Daniels v. Daniels*, 9 Col. 133, 147, *et seq.*; *Glover v. Glover*, 16 Ala. 440; *Hinds v. Hinds*, 22 Cent. Law J. 308; *Platner v. Platner*, 66 Iowa, 378; *Finn v. Finn*, 62 Iowa, 482; *Paterson v. Paterson*, 1 Halst. Ch. 389; *Thompson v. Thompson*, 10 Rich Eq. 416.

As far as these cases are decided on the ground that equity has an original jurisdiction over the question of alimony or a separate allowance to married women, independent of any other subject connected with it (and these cases are nearly all decided on that ground), we think they are wrongly decided. While it is, of course, unquestionable that such powers may be granted to commissioners, or be legalized by act of parliament, as well as conferred upon courts of chancery or any other courts by statute; yet we think these cases do not sustain the position that such powers pertain to chancery, as that court and its principles were derived by this country from England. Some of the cases purport to be decided on the maxim, *Ubi jus ibi remedium* ("There is no wrong without a remedy"), but a similar application of that principle to the case of an infant would, with almost equal consistency, admit of a minor filing a bill against his father for separate maintenance. We think the maxim more applicable to such cases is, *damnum absque injuria*.

For American cases where a remedy has been given in accordance with the English chancery decisions, see *Glen v.*

Fisher, 6 Johns. Ch. 33; *Cape v. Adams*, 1 Des. 567; *Tatnell v. Fenwick*, 1 Des. 143; *Tucker v. Andrews*, 13 Me. 134; *Heath v. Heath*, 2 Hill Ch. 104; *Rees v. Waters*, 9 Watts, 90; *Perryclear v. Jacobs*, 9 Watts, 509; *Myers v. Myers*, 1 Bai. Eq. 24; *Helms v. Franciscus*, 2 Bland, 545; *Tevis v. Richardson*, 7 Monr. (Ky.) 660; *Van Epps v. Van Deusen*, 4 Paige, 64; *Howard v. Moffat*, 2 Johns. Ch. 206. And see, further, as to relief under statutes, *Nuetzel v. Nuetzel*, 13 Ill. App. 542; *Pell v. Walsh*, 130 Mass. 163; *The State v. Witham*, 130 Mass. 473; *Harris v. Harris*, 101 Ind. 498; *Peck v. Marling's Adm'r*, 22 W. Va. 708; *Yohe v. Barnett*, 1 Binn. 358.

¹ *Johnson v. Gallagher*, 3 De G. F. & J. 494, 509, *per* Turner, L. J., approved in *Picard v. Hine*, L. R. 5 Ch. Ap. 274, 276, 277, *per* Hatherley, L. C., and Giffard, L. J.; by the judicial committee of the Privy Council, in the London Chartered Bank of Australia v. Lampiere, L. R. 4 P. C. 572, 594; and in *Pike v. Fitzgibbon*, 14 Ch. Div. 837, 841, by Malins, L. C.

² *Norton v. Turvill*, 2 P. Wms. 144; *Stanford v. Marshall*, 2 Atk. 68; *Peacock v. Monk*, 2 Ves. Sen. 190; *Hulme v. Tenant*, 1 Bro. C. C. 15; *Dillon v. Grace*, 2 Sch. & Lef. 456; *Heatley v. Thomas*, 15 Ves. 596; *Bullpin v. Clarke*, 17 Ves. 365; *Field v. Sowle*, 4 Russ. 112; *Stuart v. Lord Kirkwall*, 3 Madd. 387.

³ The leading case on this question is *Hulme v. Tenant*, 1 Bro. C. C. 15, in which it was distinctly laid down by Lord Rosslyn that the separate estates of mar-

Where a married woman is living separate from her husband, that is a strong reason for saying that she intended to bind that property out of which alone she could pay that which she contracted to pay. When she by entering into an agreement allows the supposition to be made that she intends to perform the agreement out of her property, she creates a debt which may be recovered not by reaching her but by reaching her property.¹

ried women are liable for their general engagements. This has been followed by numerous cases. In *Milnes v. Busk*, 2 Ves. Jr. 438, Lord Loughborough said: "As to all her debts and engagements, with regard to that she shall be answerable as a *feme sole* would be to the extent of that." See also *Murray v. Barlee*, 3 Myl. & K. 209; *Owens v. Dickenson*, Cr. & Ph. 48; *Burke v. Tuite*, 19 Ir. E. & L. R. 467; *Vaughan v. Vanderstegen*, 2 Drew. 165, 289, 363, 408; *Wright v. Chard*, 4 Drew. 673. But, as stated in the text, to bind her separate estate, it must appear that the engagement was made with reference to and upon the faith or credit of that estate. With reference to this Lord Justice Turner, in *Johnson v. Gallagher*, 3 De G. F. & J. 494, 514, while saying, "Not only the bonds, bills, and promissory notes of married women, but also their general engagements, may affect their separate estates, except as the statute of frauds may interfere where the separate property is real estate," adds, "To affect the separate estate there must be something more than the mere obligation which the law would create in the case of a single woman. What that something more may be must, I think, depend in each case upon the circumstances. What might affect the separate estate in the case of a married woman living separate from her husband might not, as I apprehend, affect it in the case of a married woman living with her husband. What might bind the separate estate, if the credit be given to the married woman, would not, as I conceive, bind it if the credit be not so given. The very term 'general engagement,' when applied to a married woman, seems to import something more than mere contract, for neither in law nor in equity can a married woman be bound by contract merely: *Aylett v. Ashton*, 1 Myl. & Cr. 105." And see *Jones v. Harris*, 9 Ves. 493; *Aguilar v. Aguilar*, 5 Madd. 414; *Gentley v. Noble*, 3 Madd. 79; *Stuart v. Lord Kirkwall*, 3 Madd. 387. And in *Tullett v. Armstrong*, 4 Beav. 319, Lord Langdale said: "It is perfectly clear that when a woman has property settled to her separate use, she may bind that property without distinctly stating that she intends to do so. She may enter into a bond,

bill, promissory note, or other obligation, which, considering her state as a married woman, could only be satisfied by means of her separate estate; and therefore the inference is conclusive that there was an intention, and a clear one, on her part that her separate estate, which would be the only means of satisfying the obligation into which she entered, should be bound. Again, I apprehend it to be clear that where a married woman having separate estate, but not knowing perfectly the nature of her interest, executes an instrument by which she plainly shows an intention to bind the interest which belongs to her, then, though she may make a mistake as to the extent of the estate vested in her, the law will say that such estate as she may have shall be bound by her own act. But in a case where she enters into no bond, contract, covenant, or obligation, and in no way contracts to do any act on her part; where the instrument which she executes does not purport to bind or to pass anything whatever that belongs to her; and where it must consequently be left to mere inference whether she intended to affect her estate in any manner or way whatever, the case is entirely different either from the case where she executes a bond, promissory note, or other instrument, or where she enters into a covenant or obligation by which she, being a married woman, can be considered as binding her separate estate." And see *per Lord Redesdale*, in *Dillon v. Grace*, 2 Sch. & Lef. 456, 463; *Wright v. Englefield*, Anbl. 468; *Heatley v. Thomas*, 15 Ves. 596; *Coppin v. Gray*, 1 Y. & C. N. C. 205; *Bullpin v. Clarke*, 17 Ves. 365; *Field v. Sowle*, 4 Russ. 112; *Murray v. Barlee*, 4 Sim. 82; 3 Myl. & K. 209; *Owens v. Dickenson*, Cr. & Ph. 48; *Crosby v. Church*, 3 Bea. 485.

¹ *Picard v. Hine*, L. R. 5 Ch. Ap. 274, 277, *per Lord Hatherley*. In *Mrs. Mathewman's Case*, L. R. 3 Eq. 781, 787, the law is thus clearly stated: "If a married woman having separate property enters into a pecuniary engagement, whether by ordering goods or otherwise, which, if she were a *feme sole*, would constitute her a debtor, and, in entering into such engagement, she purports to contract, not for her husband, but for herself, and

But the general engagements of a married woman entitled to separate estate can only be enforced against so much of the sepa-

on the credit of her separate estate, and it was so intended by her, and so understood by the person with whom she is contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable; and the question whether the obligation was contracted in the manner I have mentioned must depend upon the facts and circumstances of each particular case. It clearly is not necessary that the contract should be in writing, because it is now admitted that if a married woman enters into a verbal contract expressly making her separate estate liable, such contract would bind it; nor is it necessary that there should be any express reference made to the fact of there being such separate estate, for a bond or promissory note given by a married woman, without any mention of her separate estate, has long been held sufficient to make her separate estate liable. If the circumstances are such as to lead to the conclusion that she was contracting not for her husband, but for herself, in respect of her separate estate, that separate estate will be liable to satisfy the obligation." Therefore, in this case, where a married woman, having separate estate, contracted to take shares in her own name in a joint-stock company, which was afterwards wound up, the court, being of opinion that such contract was entered into upon the credit of her separate estate, and that the deed of settlement did not exclude married women from being shareholders so as to bind their separate estate, placed the married woman on the list of contributories in her own right, so as to bind her separate estate. *Mrs. Matthewman's Case*, L. R. 3 Eq. 781. But see *Vaughan v. Vanderstegen*, 2 Drew. 363, and *Shattock v. Shattock*, L. R. 2 Eq. 182, as to the distinction between property which is settled as the separate estate of a married woman, and property over which she has merely a power of appointment, which she has exercised, — two things perfectly distinct from each other, but very often confounded. These cases are, however, disapproved, and dissented from in *The London Chartered Bank of Australia v. Lempière*, L. R. 4 P. C. 572, 594, 596, where it is held that the property of a married woman, settled by an antenuptial settlement for her separate use for life, with remainder as she should by deed or will appoint, with remainder in failure of appointment to her executors or administrators, is an absolute settlement for her sole and separate use, without restraint on anticipation, and vests in equity the entire

corpus in her for all purposes. The distinction is made by Lord Justice Turner, in *Johnson v. Gallagher*, 3 De G. F. & J. 494, 516, between the cases, where, 1st, the power of appointment has been general, by deed or writing or by will; 2nd, where it has been by will only and the power has been exercised, but not for creditors; and 3rd, where there has been a limitation in default of appointment, and the power has not been exercised. In cases under the third class there seems to be no reasonable doubt that the debts and engagements of the married woman cannot prevail against the parties entitled in default of appointment. *Nail v. Punter*, 5 Sim. 555. In cases falling under the first class, the courts have held the *corpus* of the property to be subject to the debts and engagements of the married woman: *Allen v. Papworth*, 1 Ves. Sen. 163; *Hulme v. Tenant*, 1 Bro. C. C. 15; *Heatley v. Thomas*, 15 Ves. 596; so far at least, during the life of the married woman, as to affect her limited interest. *Hulme v. Tenant*, 1 Bro. C. C. 15; *Field v. Sowle*, 4 Russ. 112. As to the second class the authorities are not in harmony, though we think the weight of authority is in favor of holding that the creditors will take as against the appointees. See *Norton v. Turrill*, 2 P. Wms. 144; *Sockett v. Wray*, 4 Bro. C. C. 483; *Hughes v. Wells*, 9 Hare, 749; *Heatley v. Thomas*, 15 Ves. 596; *The London Chartered Bank of Australia v. Lempière*, L. R. 4 P. C. 572, condemning *Vaughan v. Vanderstegen*, 9 Hare, 479, and *Shattock v. Shattock*, L. R. 2 Eq. 182. In *Johnson v. Gallagher*, 3 De G. F. & J. 517, Lord Justice Turner considered that Sir Wm. Grant treated the point as doubtful in *Heatley v. Thomas*, 15 Ves. 596. Sir Wm. Grant's observations are these: "The question is, whether this was separate property to all intents and purposes. In *Lockett v. Wray*, 4 Bro. C. C. 483, Lord Alvanley did not consider a married woman who had only a power of appointment by will as having separate property, distinguishing that case from *Norton v. Turrill*, 2 P. Wms. 144, where the creditor was allowed to resort to the separate property after the death of the wife, as she had a power of appointing by deed or will. Upon the question in *Lockett v. Wray*, 4 Bro. C. C. 483, whether the wife could give the property to her husband, Lord Alvanley held that she could not; that she could not affect it in any way but by a revocable instrument; and the bond was an instrument not re-

rate estate to which she was entitled, free from any restraint on anticipation, at the time when the engagements were entered into, as remains at the time when judgment is given, and not against separate estate to which she became entitled after the time of the engagements, nor against separate estate to which she was entitled at the time of the engagements subject to a restraint on anticipation. The reasons for this doctrine we consider are two; *First*, because, as the very essence of the whole liability, the separate property of a married woman is only bound for her general engagements when it appears that such engagements were made with reference to and upon the credit or faith of that estate, and not on the credit or faith of an estate which she does not possess, or over which she has not the power of anticipation;¹ and *second*, because to hold otherwise would be to declare that a married woman, who expressly has no power of anticipation, can in effect anticipate.²

vocable. If this was absolute separate property in Mrs. Johnson, upon the plaintiff's construction of the deed, that takes it out of the case of *Lockett v. Wray*, 4 Bro. C. C. 483, and brings it to that of *Hulme v. Tenant*, 1 Bro. C. C. 16." In this case, a bond creditor of the married woman sought payment out of property appointed by her will. A doubt was raised in the case, on the true construction of the settlement, as to whether it did in fact give her a power of disposal, by deed or otherwise, *inter vivos*, as well as by will, and that doubt being resolved in the affirmative, the plaintiff obtained the decree sought for by him. Commenting on this, the Privy Council say: "In that case it is obvious that Sir Wm. Grant considered that property settled to a married woman's separate use for life, with power to dispose of it by deed or will, was, in effect, separate property. That case was in one respect a strong one, as there was no gift over except in the event of her dying in her husband's lifetime. She survived him, and, therefore, irrespective of the settlement, became again possessed of the property in her original right; so that, upon the death of her husband, the property stood settled to herself for life, remainder as she should by deed or will appoint, remainder to herself absolutely. But, having property, over which at the time of making the bond she had absolute power of disposition notwithstanding her coverture, the bond by which, notwithstanding her coverture, she had bound herself, was decreed to be satisfied out of it." The London Chartered Bank of Australia v. Lempière, L. R. 4 P. C. 595. In this latter case, the gift was to the married woman for her separate use

for life, with remainder, as she should, notwithstanding her coverture, by deed or will appoint, with remainder to her executors or administrators. In delivering judgment, the Privy Council say: "Their lordships are satisfied that, on the weight of authority and on principle, they ought to treat this, as what in common sense and to common apprehension it would be, — an absolute gift to the sole and separate use of the lady. The words are an expansion of what would be implied in the words 'sole and separate use;' and they conceive themselves at liberty to hold that such a form of gift to a married woman, without any restraint on anticipation, vests, in equity, the entire *corpus* in her for all purposes, as fully as a similar gift to a man would vest it in him." *Ibid.* We think, with the judicial committee of the Privy Council, that on the weight of authority and on principle this is the sounder view of the law on this point.

¹ See *Hulme v. Tenant*, 1 Bro. C. C. 15; *Milnes v. Busk*, 2 Ves. Jr. 488; *Murray v. Barlee*, 3 Myl. & K., 209; *Owens v. Dickenson*, Cr. & Ph. 48; *Burke v. Tuite*, 19 Ir. E. & L. R. 467; *Johnson v. Gallagher*, 3 De G. F. & J. 494, *per* Turner, L. J.

² It was so held by Vice-Chancellor Malins in *Pike v. Fitzgibbon*, 14 Ch. Div. 837, and by him again in *Pike v. Fitzgibbon* (2d Case), 17 Ch. Div. 454. He there held that judgment on the covenant of a married woman entitled to separate estate binds the separate estate which she has at the time when the judgment is given, including, if her husband is then dead, estate given to her separate use with a restraint against anticipation. The complete fallacy of the Vice-Chancellor is con-

A married woman is bound by estoppel in a deed of her interest in her separate property, duly executed and acknowledged by her in the same manner as if she were a *feme sole*.¹

tained in and based on his entire misapprehension of the law where he states: "It is perfectly immaterial whether a married woman has separate estate at the time [*i. e.*, at the time she made the engagement] or not." And, again: "Mr. Glasse very boldly asserted that there is no case deciding that property which a married woman had not at the date of the contract, or of the debt being contracted, was liable to pay the debt. I can only say that if such is the case I am very sorry that the courts have so entirely failed in expressing what they meant." *Ibid.* 14 Ch. Div. at p. 842. In the second case the Vice-Chancellor adhered to his decision: "I hold it to be clear that all separate property which she had at the time of the judgment, whether she had it at the time of the debt being contracted or not, is liable to fulfil her general engagements." *Ibid.* 17 Ch. Div. 455. On appeal, both decisions were reversed. *Ibid.* 17 Ch. Div. 454, 457. Brett, L. J., put the matter tersely, thus: "I differ from so much of the judgment of the Vice-Chancellor as says that the proposition applies to separate property coming into existence after the time of the engagement, even though it be not subject to a restraint on alienation. It seems to me that the after-acquired property is a different estate from the other, and no decision of courts of equity has ever held that the doctrine which is applicable to the one estate should be applied to the other, and I should decline, unless obliged, to go further in that direction. Moreover, it seems to me that even if one could go further, the terms of this new estate, where there is no power of anticipation, would take that estate out of the principle applicable to the other, and that to hold that such an estate is subject to these liabilities would be, in fact, to strike out the words 'without power of anticipation.'" *Pike v. Fitzgibbon*, 17 Ch. Div. at p. 462. And see *Roberts v. Watkins*, 46 L. J. Q. B. 552; *Re Sykes's Trusts*, 2 J. & H. 415; *King v. Lucas*, 23 Ch. Div. 712; *Stanley v. Stanley*, 7 Ch. Div. 589. See, also, on the general question, *Atwood v. Chichester*, 3 Q. B. Div. 722; *McHenry v. Davies*, L. R. 10 Eq. 88; *Chubb v. Stretch*, L. R. 9 Eq. 555; *In re Spencer*, 30 Ch. Div. 183; *Chapman v. Biggs*, 11 Q. B. Div. 27; *In re Andrews*, 30 Ch. Div. 159; *Meager v. Pellow*, 14 Q. B. Div. 973; *Hodges v. Hodges*, 20 Ch. Div. 749; *Lancashire & Yorkshire Bank v. Jee*, W. N. for 1875, 213.

Moneys advanced by a stranger in providing necessities for the support of a married woman, living separate from her husband, are debts binding her separate estate; and being debts payable out of funds held in trust for her separate use, are not barred by the statute of limitations. *Hodgson v. Williamson*, 15 Ch. Div. 87; *Norton v. Turrill*, 2 P. Wms. 144. In *Vaughan v. Walker*, 8 Ir. Ch. R. 458, 464, Lord Justice Blackburne, dissenting from the Lord Chancellor, differed with the holding in *Norton v. Turrill*, 2 P. Wms. 144; but was condemned in *Hodgson v. Williamson*, 15 Ch. Div. 87, 91, as proceeding on a fallacy.

The law in the United States, with reference to the separate property of married women before the passage of the Married Woman's Acts, is very much to the same effect as in England. See *Kirksey v. Friend*, 48 Ala. 276; *Beaudry v. Belch*, 47 Cal. 183; *Re Kinkead*, 3 Biss. 405; *Davis v. Davis*, 43 Ind. 561; *McCaleb v. Crichtfield*, 5 Heisk. (Tenn.) 288; *Siemens v. Kleeburg*, 56 Mo. 196; *Wright v. Dresser*, 116 Mass. 51; *May v. Smith*, 48 Ala. 483; *Conn. Life Ins. Co. v. McCormick*, 45 Cal. 580; *Jordan v. Peak*, 38 Tex. 429; *Yale v. Dederer*, 21 Barb. 286; *Bell v. Kellar*, 8 B. Mon. 381; *Ozley v. Ikellheimer*, 26 Ala. 332; *Collins v. Rudolph*, 19 Ala. 616; *Priest v. Cone*, 51 Vt. 495; *McVey v. Cantrell*, 70 N. Y. 295; *Patrick v. Littell*, 36 Ohio, 79; *Willard v. Eastham*, 15 Gray, 328; *Rogers v. Ward*, 8 Allen, 387; *White v. McNett*, 33 N. Y. 371; *Partridge v. Stocker*, 36 Vt. 108; *Frary v. Booth*, 37 Vt. 78; *Imlay v. Huntington*, 20 Conn. 146; *Meth. Epis. Church v. Jacques*, 17 Johns. 548; *Yale v. Dederer*, 18 N. Y. 265; *Carter v. Howard*, 39 Vt. 106; *Bugbee v. Blood*, 48 Vt. 497; *Dale v. Robinson*, 51 Vt. 20. But see *Ewing v. Smith*, 3 Des. 417; *Carter v. Eveleigh*, 4 Des. 19; *James v. Maysant*, 4 Des. 591.

¹ *Jones v. Frost*, L. R. 7 Ch. Ap. 773; *Crofts v. Middleton*, 8 De G. M. & G. 192. See, further, *Wright v. Wright*, 1 Ves. Sen. 409; *Wood v. Lambirth*, 1 Ph. 8; *Dowell v. Dew*, 1 Y. & C. C. C. 345; *Bensley v. Burdon*, 2 Sim. & St. 519; *Right v. Backnell*, 2 B. & Ad. 278; *Hobbs v. Norton*, 1 Vern. 136; *Raw v. Pote*, 2 Vern. 239; *Stronge v. Hawkes*, 4 De G. M. & G. 186; *Legh v. Legh*, 1 Bos. & P. 447; *Roberts v. Lloyd*, 2 Beav. 376; *Fortescue v. Barnett*, 3 Myl. & K. 36; *Stead v. Nelson*, 2 Beav. 245; *Owens v. Dickenson*, Cr. & Ph. 48.

The law is well settled that when the wife is left without maintenance or support by the husband; has traded as a *feme sole*, and has obtained credit as such, she ought to be liable for her debts. And the law is the same whether the husband is banished for his crimes or has voluntarily abandoned the wife. It is for the benefit of the *feme covert* that she should be answerable for her debts, and liable to an action in such a case; otherwise she could not obtain credit, and would have no means of gaining a livelihood.¹

A claim was made against the estate of a deceased married

¹ *Rhea v. Rhenner*, 1 Peters, 105. This doctrine has been long established. It appears by the Year Book, 1 Hen. 4, 1. a, that Sir Thomas Belknap was banished to Gascony, there to remain until he obtained the king's favor, and his wife was permitted to sue in her own name as a *feme sole*. Co. Litt. 133, a. Banishment or abjuration of the realm by the husband was considered as his civil death, and in *Newsome v. Boyer*, 3 P. Wms. 37, it was held that the banishment of the husband, even for a limited time, operates a removal of the disabilities of the coverture, so far as to enable the wife to sue and be sued as a *feme sole*, although the time of banishment had expired when the action was brought. And where the husband resided abroad, leaving his wife to trade and gain credit as a *feme sole*, this has been considered as sufficient to entitle her to obtain credit, and to render her liable to be sued in her own name. *DeGerillon v. L'Aigle*, 1 B. & P. 357. This case was followed by the Supreme Court of Massachusetts, in *Gregory v. Paul*, 15 Mass. 31, where it was held that a *feme covert*, whose husband deserted her in a foreign country, and who had thereafter maintained herself as a single woman, having lived for five years in Massachusetts, the husband being a foreigner, and having never been in the United States, was competent to sue and be sued in her own name, and that her release was a valid discharge for any judgment she might recover. In *Walford v. The Duchess de Pienne*, 2 Esp. 554, the duke was a foreigner, who left England in 1793, with an intention of returning soon. The suit was brought against the duchess in 1797, and the court held that the husband's absence, thus continued, should be considered as a desertion of the wife, and as sufficient to enable her to contract on her own account. But in *Bogget v. Frier*, 11 East, 303, the wife was not permitted to sue in her own name, although her husband had gone to sea without making any provision for her support. But, in that

case, the husband was born within the realm, was then a subject, had not been banished, and had not abjured the realm. The court held that, under such circumstances, his absence might be considered temporary, and, therefore, as not varying the rights of the husband or wife. The wife, too, of an alien enemy has been held liable to suits, as the husband was not amenable to the process of the court. *Deerley v. The Duchess of Mazarine*, 1 Ld. Raym. 147; 1 Salk. 116. In *The Countess of Portland v. Prodggers*, 2 Vern. 104, where the husband of Lady Sandys was, by act of parliament, banished for life, the court sustained the validity of her will, holding that, in such cases, the wife might act in all things as a *feme sole*, and as if her husband was dead, and that the necessities of the case required that she should have such power. See, further, on these questions, *Dubois v. Hole*, 2 Vern. 613; *Sparrow v. Carruthers*, 2 Bl. R. 1197; *Eliza Wilmot's Case*, Moo. 851; s. c. Roll. 183; *Carroll v. Blencoe*, 4 Esp. 27; *Robinson v. Reynolds*, 1 Aik. 174; *Edwards v. Davis*, 16 Johns. 286; *Cornwall v. Hoyt*, 7 Conn. 420; *Troughton v. Hill*, 2 Hay. 406; *Wright v. Wright*, 2 Dess. 244; *Lewis v. Lee*, 3 B. & C. 291; *Dean v. Richmond*, 5 Pick. 461; *Ex parte Franks*, 7 Bing. 762; *Williamson v. Dawes*, 9 Bing. 294. The consequences of abjuration are enumerated in Hawk. P. C. b. 2, c. 9; Staundef. Prerog. 117; 3 Inst. 115. The consequences of transportation are only those enacted by statute. In England, prior to the passage of the Married Woman's Property Protection Acts, when a convict returned he was restored to all his rights, as at common law; the *vinculum matrimonii* remained unbroken, and what the wife acquired during his absence was his property. By 5 Geo. 4, c. 84, § 26, convicts might sue upon obtaining remission of their sentence; and their capacity to acquire property was acknowledged by 19 Geo. 4, c. 74. See, further, on this point, *infra*, on the effect of the Married Woman's Property Acts.

woman for groceries supplied during her life, to a household in which the husband and wife and their children were living together, and for which the husband had given promissory notes, signing them as trustee for his wife. The grocer did not testify to any express contract with the wife, and he admitted that she had never promised to give him security on her real estate. The United States Supreme Court held that the obligation to pay for the supplies of the family is ordinarily a debt of the husband, and that the promissory notes did not bind the wife in absence of clear proof of authority from her to give them. The decision of the court below, holding her separate estate liable, was reversed.¹

A married woman gave up to her husband £500, held upon trust for her separate use, upon the understanding that the husband would settle her furniture upon her for her separate use. The husband assigned the furniture to a trustee to hold for the use and benefit of his wife, and the property remained in the joint possession of husband and wife. The assignment was not registered under the Bills of Sales Acts, and the husband afterwards became bankrupt. It was held that, independently of the Bills of Sales Acts, the plaintiff would have been entitled to have the furniture secured for her separate use;² but the assignment acting as a bill of sale, came within the act, and, not being registered under the act, the furniture remained in the order and disposition of the bankrupt, and could not be protected against the assignee.³ It was pointed out that, prior to the Bills of Sales Acts, if a transfer of goods were made, and the goods were retained by the assignor, if his holding them was consistent with the instrument under which they were held, they would not be deemed to be in the "order and disposition" of the holder; but that now, under the Bills of Sales Acts, there must, in every change of ownership of chattels in the possession of the assignor, be a registration, if he remains in possession, to prevent his obtaining credit on the faith of the possession being in himself, when, in point of fact, it is only apparent. If he is once known to be the owner of the property, then a person is entitled to treat him as still the owner, unless there be some deed registered which shows that the ownership has changed. If, therefore, he sells the property, the purchaser must take possession as soon as circumstances permit; and if, instead of taking possession, he allows the seller to remain in possession, then the property passes to the assignees.⁴

¹ Dodge v. Knowles, 114 U. S. 430.

³ Ashton v. Blackshaw, L. R. 9 Eq.

² See Simmons v. Edwards, 16 M. & W. 510.
838; Jarman v. Woolloton, 3 T. R. 618;
Clark v. Crownshaw, 3 B. & Ad. 804.

⁴ And see Fowler v. Foster, 5 Jur. N. s. 99.

The right of a husband to settle a portion of his property upon his wife, and thus provide against the vicissitudes of fortune, when this can be done without impairing existing claims of creditors, is indisputable. He may make such a settlement, where he does not thereby impair the claims of existing creditors, and the settlement is not intended as a cover to future schemes of fraud, either by the purchase of property and taking a deed thereof in her name, or by its transfer to trustees for her benefit.¹

But a desire by a husband to secure for his wife provision against the necessities of the future, will not sustain such a conveyance; though the payment in this way of a debt due by the husband to his wife, or an investment by him of funds realized from a sale of her individual property, will do so. Where the transaction as to payment to a third person for a like debt would have been unassailable, the result is not changed because the wife is the person to whom the debt is due, and not another. While transactions by way of purchase or security between husband and wife should be carefully scrutinized; when they are shown to have been upon full consideration from one to the other, or, when voluntary, that the husband was at the time free from debt and possessed of ample means, the same protection will be afforded them as to like transactions between third persons.²

It was held by the United States Supreme Court in *De Lane v. Moore*:³ 1. That an antenuptial contract is good in South Carolina, as between the parties, from the time of its execution, without being recorded; and as to subsequent creditors and purchasers, it operates as notice to them from the time of its execution, if recorded within three months from that time; but if not recorded until after the expiration of three months from the date of its execution, it would, by construction, as to such creditors and purchasers, operate only from the time it was recorded, unless as to such creditors and purchasers with notice, to which latter class it would operate from the period of its execution. 2. That an antenuptial contract, duly made and recorded in the State where the parties reside, and where the property is, continues to bind that property as against creditors and purchasers on its subsequent removal to another State.

¹ *Jones v. Clifton*, 101 U. S. 225, 227; *Sexton v. Wheaton*, 8 Wheat. 229; *Moore v. Page*, 111 U. S. 117.

² *Bean v. Patterson*, 122 U. S. 496. And see *Lloyd v. Fulton*, 91 U. S. 479; *Smith v. Vodges*, 92 U. S. 183; *Sexton v. Wheaton*, 6 Wheat. 229; *Mattingly v. Nye*, 8 Wall. 370; *Trust Co. v. Sedgwick*, 97 U. S. 304; *Clark v. Killian*, 103 U. S. 766; *Lane v. Kingsbury*, 11 Mo. 402;

Payne v. Stanton, 59 Mo. 158; *Burgess v. McLean*, 85 Mo. 678; *Gould v. Hill*, 18 Ala. 84; *Heck v. Clippenger*, 5 Penn. 385; *Tyson's Ap.*, 10 Penn. 220; *Hartley v. Hurle*, 5 Ves. 540; *Tyler v. Lake*, 2 Russ. & Myl. 183; *Neimcewicz v. Gahn*, 3 Paige, 614; 11 Wend. 312; *Johns v. Reardon*, 11 Md. 465; *Payne v. Troyman*, 68 Mo. 339; *Wilcox v. Todd*, 64 Mo. 388.

³ 14 How. 253.

5. MARRIED WOMEN'S PROPERTY ACTS.

Modern statutes in England and in this country have very materially altered the *status* of married women with respect to their separate property.

In England, by 20 and 21 Vic., c. 85, s. 25, it is provided that a married woman, while judicially separated from her husband, is to be considered a *feme sole* with respect to property of every description which she may acquire, or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead. By the 21st section, a wife deserted by her husband may obtain an order for the protection of her property, under which she has the right to control her subsequently acquired property and earnings as a *feme sole*; and, by the 26th section, when judicially separated from her husband she is to be considered as a *feme sole* for the purposes of contract, and wrongs, and injuries, and suing and being sued in any civil proceedings. By 21 and 22 Vic., secs. 6-10, further provisions are made for the protection of her property where she has obtained an order for protection or a decree for judicial separation. By the Married Women's Property Act, 1870 (amended by the Married Women's Property Act, 1874), such protection is extended to all married women. By section 1, it is provided that the wages and earnings of any married woman, acquired and gained by her after the passing of the act, in any employment, occupation, or trade in which she is engaged, or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property. Sections 3-7 make provisions relative to her property before or acquired after marriage, and section 11 gives her the right of action in her own name for the recovery, protection, and security of her separate property. The act also provides that she may effect insurance on her own or her husband's life for her own benefit, and a married woman having separate property is made liable for the support of her children, the same as a widow, and for the support of her indigent husband under The Poor Law Amendment Act, 1868.

These acts are consolidated and amended by the Married

Women's Property Act, 1882,¹ in which the powers of a married woman are still further enlarged. By the first section she is declared capable of acquiring, holding, and disposing, by will or otherwise, of any real or personal property as her separate property, as if she were a *feme sole*. She may enter into and render herself liable in respect of and to the extent of her separate property, on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*; and she is made liable to the bankruptcy laws if she carry on trade separately from her husband, in the same way as if she were a *feme sole*. By subsequent sections her separate property, real and personal, owned by her at her marriage, or acquired by her subsequently, vests in herself; and the act gives her, in effect, generally, all the rights and powers of a *feme sole*, with respect to her property, real and personal, whether vested or contingent, and whether in possession, reversion, or remainder, belonging to her at the time of her marriage, or which shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill. The act otherwise makes the fullest provision for the protection of her property, and her rights therein and growing thereout.

In this country, in the State of Louisiana, in 1855,² an act was passed enabling married women to contract debts and bind their property; the first section providing that from and after the passage of the act, all married women in the State over the age of twenty-one years might, by and with the authorization of their husbands, borrow money or contract debts for their separate benefit and advantage, and, to secure the same, grant mortgages or other securities affecting their separate estate, paraphernal or dotal. This power, however, could only be exercised on the certificate of the judge of the district or parish, that it, in effect, was for her own benefit, and not for the benefit of her husband or for their joint benefit.³ Many years prior to the passage of that act an act was passed in Louisiana providing for a community of "acquets and gains" between husband and wife; a right of survivorship in the share of the other in the community property being given to the survivor in certain cases;⁴ the provisions of law regulating the community of acquets and gains being in 1852 extended to

¹ 45 & 46 Vic. c. 75.

² Act No. 200, p. 254, Acts of Louisiana.

particulieres, ou celles appartenant à la communauté."

⁴ See Acts of Louisiana for 1844, No. 152, p. 99.

³ "Ou pour l'avantage de ses propriétés

married persons residing out of the State acquiring property in the State.

And long before the passage of the English acts, provision was made in different States of this country for the protection of the property of married women. Thus in 1844,¹ Maine enacted that married women might become seized or possessed of any property, real or personal, by direct bequest, demise, gift, purchase, or distribution, in her own name, and as of her own property; and that when any woman possessed of property, real or personal, should marry, such property should continue to her, notwithstanding her coverture, and she should have, hold, and possess the same, as her separate property, exempt from any liability for the debts or contracts of the husband. And by chapter 148 of Acts of 1862, it was further enacted that when a married woman engages in any trade or business on her own account, and purchases goods, wares, and merchandise, or other property connected therewith, any contract which she makes in carrying on such trade or business shall be valid, and may be enforced in the same manner as if she were sole, and her separate property shall be holden by attachment or levy on execution in any suit brought to enforce such contract. But the husband and his property shall be exempt from liability on any such contract unless he was a party thereto.² By subsequent statutes, her personal earnings are vested in herself; she is made liable for her torts as a *feme sole*; she may sue and defend in her own name, either in contract or tort, for the preservation and protection of her property and personal rights; her property descends to her heirs if she die intestate;³ and she may be authorized, if her husband abandons her and leaves the State, without making sufficient provision for her maintenance, or if he is confined in the State prison in execution of a sentence, to make contracts, and to sue and be sued thereon, as if unmarried.

In Massachusetts, as far back as 1787, it was enacted that where a married man absents himself from the Commonwealth, abandoning his wife and not making sufficient provision for her maintenance, she could be empowered during the absence of her husband to make and execute any contract, under seal or otherwise; to sell and convey her estate, real and personal; and to sue and defend suits in law or equity, as if she were *sole* and unmarried.⁴ By subsequent statutes in this State, the widest powers are given to a married woman with respect to her property and

¹ Acts of Maine for 1844, c. 117, p. 104.

² Not now in force. See Rev. St. of Maine for 1883, c. 61, p. 523.

³ She does not seem under this chapter, or under the Maine chapter of Wills, to be

expressly empowered to make a will. See Rev. Sts. of Maine for 1883, c. 61, p. 523; c. 74, p. 608.

⁴ 1 Laws of Massachusetts, p. 405.

rights. Thus it is provided that the real and personal property of a woman shall, upon her marriage, remain her separate property, and a married woman may receive, receipt for, hold, manage, and dispose of property, real and personal, as if she were sole, except that she shall not, without the written consent of her husband, destroy or impair his tenancy by the curtesy in her real estate; she may, except with her husband, make contracts, oral and written, sealed and unsealed, in the same manner as if she were *sole*. Her labor is presumed to be on her own account; she may make a will, may sue and be sued, and, while not binding on her husband, she and her separate property are liable on such contracts as if she were a *feme sole*.¹

And now statutes for the protection of married women's property, more or less similar to these, are in force in the District of Columbia and in all the States and Territories of the Union, as well as in the Canadian Provinces, where the principles of the common law dominate.²

Very many questions have arisen in England and in this country under these acts.

In *Ashworth v. Outram*,³ a question arose as to the effect of 33 & 34 Vic. c. 93, under the following facts. A woman entered the service of a man as housekeeper in a house which was in his occupation, but was not his ordinary place of residence. He shortly afterwards engaged to marry her. In 1861 she commenced the business of preserving fruit, which was begun upon a small scale, but gradually became a large wholesale business. It was carried on by her in her own name; she kept a separate banking account; and he admitted that it was her own business, and was managed solely by her, though he sometimes assisted. In 1874 he married her. After the marriage the business was carried on by her as before, in her maiden name, but in consequence of the bank manager requiring it to be done, she transacted all her banking business through her husband's account, drawing cheques upon it, which she signed in his name. Her husband gave assistance as he had done before, but did not interfere with the management, and when people called on matters relating to the business, he referred to her, and, if she was out, told them that

¹ Rev. Stats. of Mass. for 1882, c. 147, p. 818.

² There seems to be no act of the kind in force in the Province of Quebec. See art. 5809, Rev. St. of Quebec for 1883. In Ontario acts very similar to those enacted in England are in force. See Rev. Sts. of Ontario for 1887, chaps. 132, 134, pp. 1250, 1264. In Nova Scotia, by the

"Married Woman's Property Act, 1884," Rev. Sts. of Nova Scotia, 5th series. c. 94, pp. 661-684, a married woman's property is vested in her, and she is given as full powers and protection with reference to her property and contracts as in any case which has come under our notice.

³ 5 Ch. Div. 923.

they must see her. She paid the wages, ordered and paid for fruit and sugar, and made all the sales. It was claimed that, under the Act of 1870, although the earnings after the marriage might belong to her, the effect of the marriage was to vest the business and property, as at common law, entirely in the husband. The court (Malins, V. C.) held that even independent of the Act of 1870, in equity she would be held to have been carrying on the trade on her own separate account, apart from and without the interference of her husband, and that there was enough in the case to show the acquiescence of the husband in allowing her to carry on the business for her own benefit, and making the property her separate property;¹ the rule in equity being that if a husband permit a wife after marriage to carry on a business for her own separate use and benefit, that becomes her separate property, which, as between him and her, is binding, and makes the property her own separate estate, and that this was confirmed by the Married Women's Property Act, 1870. On appeal the Chancery Division affirmed the judgment, and held that, the act being passed with the knowledge and in view of the then existing state of the law as administered by courts of equity, the protection under the act was carried not only to the "wages and earnings," but to those things which were necessary to make the wages and earnings which were to be protected.²

¹ *Slanning v. Style*, 3 P. Wms. 334; *Walter v. Hodge*, 2 Sw. 92; *Mews v. Mews*, 15 Beav. 529; *MacNeillie v. Acton*, 4 De G. M. & G. 744, 755.

² *Malins, V. C.*, in his judgment put the matter very clearly and conclusively: "What was the object of the act? It was found that there was a great number of cases of familiar occurrence where a woman is carrying on a trade. A familiar instance is that of a dressmaker or a milliner, or where she is carrying on an artistic occupation, such as a singer, or an actress, or a sculptor, or any of those things in which women may be skilled, and may earn great sums of money. It was thought a very hard thing that whatever a married woman earned by a business should immediately become, according to the settled principle of common law, the absolute property of the husband. In terms I am bound to say it seems that this act is addressed to the gains of married women, and not to the case of a woman who carries on business at the time of her marriage. This lady did carry on business, and made profits in the occupation or trade in which she was engaged. He agreed that she should do so. Then what does that give her? Does it give her

merely the profits of the trade without the means of making those profits? Because if the husband is to deprive her of all the stock-in-trade, and all the capital, and she has not a farthing wherewith to buy sugar or fruit and what she wants, she cannot make the money. Take the very common case of a milliner. A man marries a milliner or a dressmaker in a large way of business. She is in possession of a very large stock of silks, satins, ribbons, laces, and all those things used in her trade. The husband acquiesces in her continuing to carry on that business. Is he to have all this stock-in-trade and she to have the profits? Or if he has acquiesced in her carrying on the trade, does it not show that she is to have the means of carrying on the trade, without which she cannot carry it on? Suppose a man marries a *prima donna*, under this act all her earnings are her separate property. Do the jewellery, dresses, and various things necessary for the occupation belong to the husband? If they do, then, however much she may desire to sing, and however much the public may desire her to sing, if the husband chooses he may have every jewel and dress sold. The act must have a rational interpretation.

A very similar doctrine was established by the United States District Court, in *In re Kinkead*,¹ on both points, to that which was held in *Ashworth v. Outram*.² The court held in this case, as in that, that a married woman, in equity, may hold her separate property; can control and dispose of it; incur liabilities on the credit of it; and that it can be subjected to the payment of debts contracted in or about the management, improvement, or purchase of such property, independent of the statute.³ And, under the Illinois Married Women's Act of 1861, the wife became absolute mistress of her own earnings, and could bring suit in her name to collect them. She might superintend her separate property, make binding contracts in relation thereto, and devote her time to such occupation as was most congenial to her tastes, and control her earnings.⁴

It has also been held, under the English Act of 1870, that sec-

Therefore when it says she is to have the fruits of her occupation or trade, or the result of her artistic skill, it seems to me that if she has the consent of her husband that she shall do these things she must also have the means of doing so. If, therefore, he consents to her continuing to act as a painter, she must have her easel and canvas and various things she uses; if she be a sculptor, she must have marbles and chisels and those things; if she be an actress or singer, she must have the dresses and jewels and those things, without which she cannot appear in public; and if she be, as in the present case, a preserve-maker, my opinion is she must have the pots and pans and stock of sugar and of fruit, and all the appliances which shall enable her to make money by that occupation. Consenting that she shall do the thing means that she shall have the means whereby it is to be done; and to hold that all the stock-in-trade and every debt owing to her, and everything she has in the world except the skill, is to belong to the husband, and that she shall have the skill and power of carrying it on without any means of doing it, would in my opinion be an utter absurdity, and a narrow construction of the act of parliament. Therefore my construction is that when a man consents to his wife carrying on the particular operation, and thereby gaining money, that is a consent to her having those things whereby those moneys are made. In this case, without the stock-in-trade, without the debts owing to her, and a little capital, she could not have carried on that occupation. I am of opinion he consented to that, and consenting to that means that he consented to her having the business and everything belonging to the business. That is the conclusion,

therefore, on the act of parliament, to which I arrive." *Ashworth v. Outram*, 5 Ch. Div. 933 *et seq.* See *Levell v. Newton*, 4 C. P. Div. 7, following *Ashworth v. Outram*.

¹ 3 Biss. 405.

² 5 Ch. Div. 923.

³ *Carpenter v. Mitchell*, 50 Ill. 470; *Jones v. Crosthwait*, 17 Iowa, 393; *Yale v. Dederer*, 18 N. Y. 265, 22 N. Y. 450; *Howe v. Wildes*, 34 Me. 566; *Carpenter v. Mitchell*, 54 Ill. 127; *Miller v. Brown*, 47 Mo. 504; *Kimm v. Weippert*, 46 Mo. 532; *Darby v. Callaghan*, 16 N. Y. 21; *Knapp v. Smith*, 27 N. Y. 277; *Ketchum v. Walsworth*, 5 Wis. 95.

⁴ The court concluded further: "She may, therefore, it seems to me, engage in trade either with or without her husband's consent, — certainly with his consent, — using her own property in the enterprise, and may bind herself by all contracts she makes in her business. She may own the whole of a stock of merchandise, or the machinery and furnishings of a manufactory, and have the entire profits and be liable for the losses." It was also held further that she could enter into a co-partnership with another, even though that other was her husband, and as such partner be liable to be adjudged a bankrupt. *In re Kinkead*, 3 Biss. 405, 410. Under the English Act of 1882, section 1, sub-section 5, a married woman carrying on a separate business is expressly made liable, with respect to her separate property, to the bankruptcy laws; but, under the Act of 1870, it was held that a married woman — at least one who had no separate property — could not be adjudicated a bankrupt. *Ex parte Holland*, 9 Ch. Ap. 307.

tion 11 enables a married woman to maintain an action in her own name to recover damages for dishonoring cheques drawn by her in the course of a trade which she carries on separately from her husband, or for not duly presenting or not giving due notice of dishonor of a bill of exchange acquired by her in such trade, and intrusted to bankers by her for presentment; it being a remedy "for the protection and security" of her separate property.¹

Under the English act of 1882, it has been held that the contract which is to bind separate property of a married woman must be entered into at a time when the married woman has existing separate property. If she has such property, her contract will bind it. If she afterwards commits a breach of the contract, and proceedings are taken against her for the breach of contract, any separate property which she has acquired since the date of the contract, and which she has at the time when judgment is recovered against her, will be liable for the breach of the contract. But the act does not enable her, by means of a contract entered into at a time when she has no existing separate property, to bind any possible contingent separate property.² And it is also held that the act is not retrospective; and, therefore, in an action on a contract made by a married woman before the passing of the act, judgment cannot be ordered in such terms as to be available against separate property to which the defendant became entitled after the date of the contract.³

The court, in *Huntington v. Saunders*,⁴ adhered to the principles laid down in *Phipps v. Sedgwick*,⁵ relative to the obligations and liabilities of a married woman with respect to property received by her from her husband, that while State statutes have recognized certain rights of the wife to deal with and contract in reference to her separate property, they fall far short of establishing the principle that out of that separate property she can be

¹ *Summers v. City Bank*, L. R. 9 C. P. 580. As to the rights of a married woman who has obtained a "protection" order under the 21st section of the Act, see *Ramsden v. Brearley*, 10 Q. B. 147; *Nicholson v. Drury Buildings Estate Co.*, 7 Ch. Div. 48; *In re Coward & Adam's Purchase*, L. R. 20 Eq. 179. As to further questions arising under this Act, see *Matthews v. Whittle*, 13 Ch. Div. 811; *Thompson v. Bennett*, 6 Ch. Div. 739; *Holt v. Everall*, 2 Ch. Div. 266; *Hancocks v. Lablache*, 3 C. P. Div. 197; *De Greuchy v. Wills*, 4 C. P. Div. 362; *The Queen v. Carnatic Railway Co.*, L. R. 8 Q. B. 299; *Bell v. Stoecker*, 10 Q. B. Div. 129; *King v. Voss*, 13 Ch. Div. 504.

² *In re Shakspear*, 30 Ch. Div. 169.

³ *Turnbull v. Forman*, 15 Q. B. Div.

234. See also *Weldon v. Winslow*, 13 Q. B. Div. 784; *Conolan v. Leyland*, 27 Ch. Div. 632; *Bursill v. Tanner*, 13 Q. B. Div. 691. See as to the law before this act came into force, *Pike v. Fitzgibbon*, 17 Ch. Div. 454; *King v. Lucas*, 23 Ch. Div. 712. Under 45 & 46 Vic. c. 75, § 3, when a married woman seeks to prove, under her husband's bankruptcy, for money lent by her to him, she must show that the money was not lent for the purposes of his trade or business. If she fails to do so, she cannot prove or vote until all the other creditors have been paid in full. *In re Genese*, 16 Q. B. Div. 700. See *Ex parte Taylor*, 12 Ch. Div. 366, under an analogous Act.

⁴ 120 U. S. 78.

⁵ 95 U. S. 3; stated *ante*, p. 151 n.

made liable for money or property received at her husband's hands which, in equity, ought to have gone to pay his debts. Equity has been ready, where such property remains in her hands, to restore it to its proper use, but not to hold her separate estate for what she has received and probably spent at his dictation. Such a proposition would be a very unjust one to the wife still under the dominion, control, and personal influence of the husband. In receiving favors at his hands, which she supposed to be the offerings of affection, or a proper provision for her comfort, she would be subjecting that which was her own, or which might afterwards come to her from other sources, to unknown and unsuspected charges, of the amount and nature of which she would be wholly ignorant. It answers the demands of justice in such cases if the creditor, finding the property in her hands, or in the hands of one holding it with notice, appropriates it to pay his debt. But if it is beyond his reach, the wife should no more be held liable for it than if the husband himself had spent it in support of his family, or even of his own extravagance.

Purchases of either real or personal property, made by the wife of an insolvent debtor during coverture, are justly regarded with suspicion, unless it clearly appears that the consideration was paid out of her separate estate. Such is the community of interest between husband and wife; such purchases are so often made a cover for a debtor's property; are so frequently resorted to for the purpose of withdrawing his property from the reach of his creditors and preserving it for his own use, and they hold forth such temptations for fraud, that they require close scrutiny. In a contest between the creditors of the husband and the wife, there is a presumption against her which she must overcome by affirmative proof. Such has always been the rule of the common law; and the rule continues, though statutes have modified the doctrine that gave to the husband absolutely the personal property of the wife in possession, and the right to reduce into possession and ownership all her *choses in action*.¹

In Mississippi, by their code of 1871,² married women may rent their lands or make any contract for the use of the same, and may loan their money and take securities for its payment, and employ

¹ *Leitz v. Mitchell*, 94 U. S. 580; *Gamber v. Gamber*, 18 Pa. St. 306; *Keeny v. Good*, 21 *Ib.* 349; *Walker v. Reamey*, 36 *Ib.* 410; *Parvin v. Capewell*, 9 Wright, 89; *Bradford's Appeal*, 5 Casey, 513; *Anrand v. Shaffer*, 7 Wright, 363. So property purchased by a married woman on credit, or with her earnings, has been held to be subject to the levy of an execution against her husband. *Robinson v.*

Wallace, 3 Wright, 129; *Switzer v. Valentine*, 4 Duer, 96; *Glann v. Younglove*, 27 Barb. 480; *Woodbeck v. Havens*, 42 *Ib.* 66; *Rider v. Hulse*, 24 N. Y. 372; *Connors v. Connors*, 4 Wis. 131; *Elliott v. Bentley*, 17 *Ib.* 610; *Edson v. Hayden*, 20 *Ib.* 682; *Duncan v. Roselle*, 15 Iowa, 501; *Cramer v. Redford*, 17 N. J. Eq. 367.

² Section 1780.

it in trade or business, and the express enactment is that all contracts made by the husband and wife, or by either of them, to obtain supplies for the plantation of the wife, may be enforced and satisfaction secured out of her separate estate. Provision is also made that when a married woman engages in trade or business as a *feme sole*, she shall be bound by her contracts made in the course of such trade or business in the same manner as if she was unmarried.¹

We examine more particularly some of the late decisions in this country under the Married Women's Acts.

1. HER STATUS.

As those acts have to a greater or less extent affected the *status* of husband and wife in connection with the rights to property and the power to contract, we examine, first, some of the cases on these questions. The Supreme Court of the United States, in an appeal from the Supreme Court of the District of Columbia, the judgment in which was reversed, in a case where a wife had a separate estate of which the husband was trustee, and the plaintiff claimed for groceries supplied to the household in which the husband and wife and their children were living together, and upon promissory notes given by the husband, describing himself as trustee for the wife, in payment for the groceries so supplied, — held that, as the obligation to pay for the supplies of the family is, ordinarily, a debt of the husband, where the wife had never promised to pay for the goods or authorized her husband to promise that she would pay for them, nor gave her husband authority to give the promissory notes on her behalf, the contract bound her husband personally and not her estate.² So, in *McCoy v. Hyatt*,³ it is laid down that under the common law the acquisitions of the wife accrued to the benefit of the husband, and became liable for his debts. As her legal existence by fiction of law was swallowed up in that of her husband, her possession was his.

In the progress of law and justice, the courts of equity interfered, under certain circumstances, as against the husband and his privies, for the protection of the wife, securing to her the enjoyment of property as a *feme sole*. It was long held that a trustee for her was essential as the depositary of the legal title. Courts

¹ See, as to a married woman's contracts in Mississippi, *Bank of America v. Bank*, 101 U. S. 240; *Clopton v. Matheny*, 48 Miss. 286, 295; *Cook v. Ligon*, 54 *Ib.* 368, 373; *Hernan v. Perkins*, 52 *Ib.* 813; *Grubbs v. Collins*, 54 *Ib.* 485, 489; *Robinson v. Stadeker*, 59 *Ib.* 3.

² *Dodge v. Knowles*, 114 U. S. 430. This is a principle in equity as to the wife's separate estate, independent of statute.

³ 80 Mo. 130, 134.

of equity, however, soon held that rather than injustice should be done, they would constitute the husband, where he held the possession, a trustee for the wife.¹ And like every other principle of jurisprudence, though not changeable, yet possessing so much flexibility as to adapt itself to the growing necessities and varying circumstances of civilization, and of social and domestic life, it has so extended that courts of law, as well as of equity, recognize and adjudicate upon personalty as the absolute property of the wife under certain conditions.

Both as to the real and personal property, no particular or set phrascology is essential, in the instrument vesting the property, to create a separate estate in a married woman. It is only necessary to this end to employ such terms of expression as indicate clearly and unequivocally the intent to vest in her the title and estate independent of the husband. And in respect to personal property, the title to which may pass without deed or other instrument of writing, as by word and delivery, the separate title thereto of a *feme covert* can be established by acts, conduct, and words, as any other fact, *in pais*.² And, as was stated in *Holthaus v. Hornbostle*,¹ where the proof is clear and convincing that the property is so placed in her, the fact of the husband's indebtedness cannot affect her proprietorship and right; the object often, in giving or transferring property to the wife of an insolvent husband, being to save her from his improvidence and worthlessness.

The existence of this separate property interest in her may be drawn and established from the fact of her long and uninterrupted control over it with the acquiescence of her husband in her dominion over and management of it.³

In *Richardson v. Merrill*,⁴ and in *Caldwell v. Renfrew*,⁵ it is held that courts of law, as well as of equity, will protect property coming to the wife by gift or purchase, and though no apt words in the donation or purchase may be used to create, in the first instance, a separate estate, yet where her husband has by his acquiescence conceded her right of dominion over it, treating it as her property, it may nevertheless be regarded and protected as her separate estate; and this too against creditors of the husband, where the property has not been so mingled with the husband's, or so used by him, as to create a credit in his favor on the faith of his assumed ownership. Redfield, C. J., in *Richardson v. Merrill*,⁶ says: "All who are familiar with the subject are aware that creditors and purchasers are always bound to respect

¹ *Holthaus v. Hornbostle*, 60 Mo. 442.

² *Id.*, p. 443.

³ *Welch v. Welch*, 63 Mo. 57; *Coughlin v. Ryan*, 43 Mo. 99.

⁴ 32 Vt. 27.

⁵ 33 Vt. 213.

⁶ 32 Vt. 35.

counter-equities in third parties which come to their knowledge before they have actually made advances, or otherwise changed their position, in faith of the absolute property being in the person ostensibly holding it."

So, in *Welch v. Welch*,¹ where it was conceded that the wife never had any separate estate conveyed to her by any separate estate trust-deed, the court said, touching this, that if the gift from a husband to his wife will be upheld, it is not perceived why the same result will not follow when the gift emanates from a third person, when the husband assents to it, and treats the property as belonging exclusively to the wife.

Having regard to these principles, it was held, in *McCoy v. Hyatt*² (reversing the judgment of the court below), with reference to a mowing-machine taken in execution against a husband, which his wife alleged to be her property, that the Act of Missouri known as the Married Women's Act, passed March 25, 1875,³ in no wise interfered with the right of a married woman to acquire, or with the manner of her acquiring, a separate estate in personalty by gift or purchase, as it existed prior to its adoption; the act being designed to enlarge its operation, to simplify the proof of its existence, and to afford protection, especially against the effect of the husband's reducing the property to possession, by providing that no such reduction should be effectual which was not evidenced by writing signed by her. And, accordingly, it was further held, that if, as a matter of fact, the wife received the mowing-machine by gift or purchase, or both, from an outside person, and she, or some one for her, held the possession thereof, claiming it as hers, exclusively, for several years prior to its having been taken in execution, these would be facts from which a court or jury might conclude that she owned the property, and, if free from fraud on her part, she could hold it against her husband's creditors.⁴

It was held, in accordance with this, in the same State, that where a married woman brought into Missouri from a foreign country money that belonged to her, which by agreement between herself and husband, both before and after she came to Missouri, was to be invested as her individual property, free from the control of her husband, then such fund, and any property in which it was invested, continued to be her separate property, so long as it was so held, managed, and used by her, and during such time was not subject to seizure or sale under execution as the property

¹ 63 Mo. 59.

² 80 Mo. 130.

³ Laws 1875, p. 61; R. S. 1879, § 3296.

⁴ And see *Hammons v. Renfrow*, 84

Mo. 332; *The State v. The Chatham Nat. Bank*, 80 Mo. 626; *Kidwell v. Kirkpatrick*, 70 Mo. 214; *Bangert v. Bangert*, 13 Mo. App. 144, 153.

of the husband, or for the payment of his debts.¹ And in *The State v. The Chatham Nat. Bank*,² it was held, that chattels so brought as her separate property she would continue to possess as such, after she came to this country, irrespective of the consent of her husband, and be protected against the acts and doings of her husband, which might be in derogation of her rights and estate so acquired to her separate use. But if such chattels had not been impressed with a trust of her separate use, exclusive of her husband, then whether they become so impressed after her arrival in this country would depend upon the consent of her husband. And this independent of the Married Women's Acts. In the same State, under their Act of 1875, it was held that in a contest between a wife and her husband's creditors, mere evidence that she purchased the property during coverture is not sufficient to give her a title. It must satisfactorily appear that the property was paid for with her own separate funds, and, in the absence of such evidence, the presumption is a violent one that the husband furnished the means of payment. While the statute enlarges the rights and throws additional safeguards around the rights of married women in respect of certain personal property, the same proof as before the statute is essential to establish the fact of the purchase having been made with her separate means.³

The presumption of law is that property acquired by a married woman during coverture was paid for with the means of her husband.⁴ The burden of proof, therefore, rests on a married woman to show by evidence to the satisfaction of the jury, that she is in fact the sole and separate owner of property for which she brings an action.⁵ And while the general rule as to the presumption from possession is, that the possession of personal property is *prima facie* evidence of its ownership, this rule has no just application where the question of ownership arises between husband and wife, because the possession of their personal property is necessarily in a large measure a joint possession. The general rule is held to be that whether the possession be physically in the husband or the wife, the title is presumptively in the husband.⁶

In *Burns v. Bangert*,⁶ it was held, that the Missouri Act of 1875⁷ has not changed this rule; that if a wife were carrying on business in her own name as a *feme sole* trader, her name on a sign above her place of business, her money deposited in bank in her

¹ *The State v. Smit*, 20 Mo. App. 50.

² 80 Mo. 626.

³ *McFerran v. Kinney*, 22 Mo. App. 554.

⁴ *Sloan v. Torrey*, 78 Mo. 625. See *Leitz v. Mitchell*, 94 U. S. 580, *supra*; *Weil v. Simmons*, 66 Mo. 620, *Gamber v.*

Gamber, 18 Pa. St. 306; *Keeny v. Good*, 21 Pa. St. 349; *Walker v. Reamey*, 36 Pa. St. 410.

⁵ *Heinelreich v. Carlos*, 24 Mo. App. 264.

⁶ *Burns v. Bangert*, 16 Mo. App. 22.

⁷ Rev. Stats. § 3296.

own name, and in her own name checked out by her, — such circumstances would rebut the presumption. But the mere fact that husband and wife are living together on a farm and accumulating money by the joint earnings of themselves, of the minor children of the wife, and of hired men, and that the moneys so accumulated are kept at home by the wife, are not sufficient to rebut this presumption.¹

And in Texas, where a wife claimed personal property as her own separate property, in distinction from its being community property, which was taken in execution against her husband, the court held that, the presumption being that all property acquired by either the husband or the wife during marriage, by onerous title, is community estate, the burden of proving that any portion of it thus acquired is the separate estate of the wife rests upon the party asserting that fact.²

Where the property has been paid for in money, it must be made reasonably clear that this money was derived by the wife in such manner as to constitute it her own separate funds. The wife may become a merchant; but she must conduct the business with goods which are her separate property, and must not invest the community estate, or the credit of her husband, in the purchase of the goods, if she wishes them to be exempt from her husband's debts. For this reason she cannot purchase on credit, but must confine herself to buying for cash only, and be ready to show that the money so used is her separate means. If the profits made upon sales of the goods are mingled with her separate money in the purchase, — such profits becoming the community estate of herself and husband, — she must be prepared to show how much of her own money entered into the purchase. The burden of proving this is on her, and not upon the creditor who seizes the goods for her husband's debts. So where, in Texas, a married woman in carrying on business mingled all her purchases together; buying goods from time to time, presumably with the proceeds of such as were sold, as there was no proof to the contrary, and as she in all respects carried on business as any other merchant who buys for cash and credit, and invests the proceeds of the sale of his goods in the replenishment of his stock; as it is established law in Texas, under their statute, that the profits of the wife's separate estate are community property,

¹ As to cases before the passage of the Act, see *Woodford v. Stephens*, 51 Mo. 443, 447; *Kidwell v. Kirkpatrick*, 70 Mo. 214, overruling a *dictum* to the contrary in *Tennison v. Tennison*, 46 Mo. 77.

² *Epperson v. Jones*, 65 Tex. 425. See

Cox v. Miller, 54 Tex. 26; *Ezell v. Dodson*, 60 Tex. 332; *Braden v. Gose*, 57 Tex. 41; *Wallace v. Finberg*, 46 Tex. 35; *Green v. Ferguson*, 62 Tex. 529; *Gilliard v. Chessney*, 13 Tex. 337.

if the profits made upon the sales of the goods are mingled with the wife's separate money in the purchase, it was held that she must be prepared to show how much of her separate means she used in buying the goods; the burden of proving this being on her, and not upon the creditor seizing the goods for the husband's debts.¹

But in Wisconsin, under their statute,² it has been held, that even where the wife claims title to property seized on execution against her husband by virtue of a conveyance from him to her, as it is the established law in that State, that a married woman having a separate estate may deal with her husband respecting the same; loan him money; take a transfer of property from him in payment thereof, and buy property of him, provided the transaction was fair and honest and not in fraud of creditors;³ the burden of proof is upon her only to show that she purchased the property for a valuable and adequate consideration paid out of her separate estate, or by some other person for her. That being shown, the burden of proving such conveyance to have been made in fraud of her husband's creditors is upon the party attacking the conveyance.⁴

In Massachusetts and some other States, contracts between husband and wife are prohibited.⁵

In Pennsylvania, their Act of 1848 provides that property of whatever nature or kind which shall accrue to a married woman during coverture, shall be owned and enjoyed by her as her own separate property, and shall not be subject to levy and execution for the debts and liabilities of her husband. It has been held that it was her property only that the legislature intended to protect under this act; her earnings, her efforts, and her credit being her husband's, since the Act of 1848, as before. What she may be said to acquire, as the result of her skill and industry, or on her merely personal credit, accrues to the husband, and as to creditors is to be taken as his.⁶ A married woman there must have a

¹ *Epperson v. Jones*, 65 Tex. 425; s. c. *nom. Jones v. Epperson*, 69 Tex. 586. See *Cleveland v. Cole*, 65 Tex. 402; *Braden v. Gose*, 57 Tex. 41; *Green v. Ferguson*, 62 Tex. 529.

² Laws of 1872, ch. 155; R. S. §§ 2343, 2345.

³ *Beard v. Dedolph*, 29 Wis. 136; *Hoxie v. Price*, 31 Wis. 82; *Breslauer v. Geilfuss*, 65 Wis. 387; before the statute of 1872, the powers possessed by married women being greatly enlarged by that enactment. *Krouskop v. Shontz*, 51 Wis. 215, 216; *Houghton v. Milburn*, 54 Wis. 554; *Carney v. Gleissner*, 62 Wis. 497.

⁴ *Evans v. Rugee*, 57 Wis. 623; *Brickley v. Walker*, 68 Wis. 563.

⁵ See Mass. Pub. Stat. 1882, ch. 147, §§ 2, 3, 7, and 11; and see *Lord v. Parker*, 3 Allen, 127; *Edwards v. Stevens*, 3 Allen, 315; *Smith v. Gorman*, 41 Me. 405; *McKeen v. Frost*, 46 Me. 239; *Dwelly v. Dwelly*, 46 Me. 377.

⁶ *Raybold v. Raybold*, 8 Harris, 311. Goods purchased by a married woman on her own credit are not her separate property. *Robinson v. Wallace*, 3 Wright, 133. Her credit is nothing in the eyes of the law. When she does contract, the law esteems her the agent of her husband.

separate estate to protect her purchase upon credit, — an estate available, and proportionate to the credit it supports. The purchase must in fact be made, not upon her credit, but upon the credit of her separate estate ; upon her ability to pay out of her own funds.¹

But the later Pennsylvania Act of 1872 provides that the separate earnings of any married woman, howsoever realized, shall accrue to and inure to her separate benefit and use, and be under her exclusive control, as if she were a *feme sole*, and not be liable to any claim of the husband or his creditors ; and that “ in any suit at law, or in equity, in which the ownership of such property shall be in dispute, the person claiming such property under this act shall be compelled, in the first instance, to show title and ownership in the same.” It was held, that, under this act, it was not the intention of the legislature to dispense with the presumption which ordinarily and of necessity arises in favor of creditors, in transactions between husband and wife, affecting the ownership of property in the wife’s name. Hence, where a business belonging to the husband was transferred to his wife, the business thereafter being carried on by the husband, but as “ agent ” for his wife, it was held that property purchased with the earnings of the business was the property of the husband, and was liable to be taken under an execution against him ; the earnings of the business being those of the husband and not of the wife, the business having been really his.² And in *Blum v. Moss*,³ where a husband purported to carry on business as “ the agent ” of his wife, buying goods as her agent, giving notes therefor signed by her, and paying the notes out of the proceeds of the business, it was held that, as the whole business was conducted by the husband without the slightest reference to his wife’s personal estate — her name being, from the evidence, so obviously used as a cloak to cover the property from the claims of the husband’s creditors, — that it could not be overlooked or ignored that the property was his and not hers ; the court holding that if there was any one thing settled in relation to the subject, it is, that whilst a married woman may buy goods on credit, it must be on the credit of her separate estate, and, as against the creditors of her husband, she must affirmatively establish that fact. But where a *feme covert* owns property of value sufficient to serve as the foundation of a credit, direct proof that the credit was based upon it may not be necessary, as the jury may infer that fact from the circumstances

Hough v. Jones, 8 Casey, 432 ; Hallowell v. Hater, 11 Casey, 375.

¹ Gault v. Saffin, 8 Wright, 307.

² Leinbach v. Templin, 105 Pa. 522.

³ 116 Pa. 163.

surrounding the transaction, where they are of that nature that such an inference can be drawn from them.¹ But, as against the creditors of her husband, she must affirmatively establish the fact that goods bought by her on credit were bought on the credit of her separate estate.²

In Louisiana, the presumption of the law is that property purchased during the marriage belongs to the community and is liable to its debts, because purchased during the marriage, whether the purchase was made in the name of both or either of the spouses. But when the purchase is made in the name of the wife, she has the faculty of rebutting this presumption by proof that she purchased the property, as her separate property, by the investment of her paraphernal funds, which were administered by her separately and apart from her husband; so, where the purchase was made in the name of the wife, under her authority, the price being actually paid by her with her paraphernal funds, and the property thereafter having been regarded and treated as her own, it was held that she had successfully rebutted the presumption of law that the property purchased during the marriage was community property.³

In California, property acquired by either spouse after marriage is community property. But in *Harris v. Harris*,⁴ a woman before marriage filed a declaratory statement in the proper United States land office, of her settlement upon and intention to preempt land on which she was then living. After marriage she, with her husband, jointly occupied the land, which they cultivated and improved. She borrowed money upon her own faith and credit; paid the government for the land, and the patent was issued to her in her own name, with her husband's knowledge and consent. The court held that, as between her husband and herself, the land was the separate property of the wife, and was not community property.

2. REDUCTION INTO POSSESSION.

Resulting from the relation existing between husband and wife, many cases under these acts have arisen as to the effect on the wife's property of such relation, and as to the acts of the husband which amount to a reduction into possession of the wife's personal property. We examine some of the cases bearing on these questions.

¹ *Blum v. Ross*, 116 Pa. 163; *Bonard v. Kittering*, 101 Pa. 181; *Hess v. Brown*, 111 Pa. 124.

² *Seeds v. Kahler*, 76 Pa. 262; *Blum v. Ross*, 116 Pa. 163, 168.

³ *Stauffer v. Morgan*, 39 La. An. 632.

⁴ 71 Cal. 314.

In *Woodford v. Stevens*,¹ it was held that the husband, by marriage, acquires an absolute right to all the personal property in possession belonging to his wife, and that all subsequent acquisitions by his wife of *choses in possession* vest absolutely in him, unless such acquisitions be given or transferred to her or to him, for her sole and separate use. Where a husband, by means of the marriage, acquires the absolute right to personal property in possession, he cannot be declared a trustee for his wife by loose and general remarks in conversations. To establish such a trust against the husband, the authorities are united that the evidence must be clear and unequivocal.²

So, again, nothing is clearer at law than that the wife cannot be the recipient of a gift from the husband so as to vest in her a legal title to the subject-matter of the gift. Their unity prevents it. The personal property of the wife at law belonging to the husband; as soon as a gift is made to the wife, the gift becomes the property of the husband. Courts of equity, however, where the intention of the husband is plain that his wife should have to her separate use a portion of his estate, and when the rights of creditors are not in the way, will raise in him a trust, when no third person is interposed as trustee, and will compel him, for the benefit of his wife, to execute the trust with which the property may have been clothed.³ In this case, the husband was in possession of personal property bequeathed to his wife by a former husband, as administrator of such former husband. He made a final settlement, and it was ordered by the court that he and his wife should retain all the proceeds of the estate of the deceased in their hands. The court held that, in contemplation of law, property is reduced into possession when it is in such a state that the husband can lawfully take it into his hands if he will. It is not necessary that he should have actually taken it into his custody. If he has a right to do so at his will, it is enough. When no suit at law or equity is necessary to obtain possession of personal property, and the husband may if he will take actual possession of it, but fails or neglects to do so, the property is not the less reduced into his possession. If the property was in the possession of the wife, then the possession of the wife was the possession of the husband. And it was further held that, at the date of the order, the possession of the husband, as administrator, ceased, and that his possession *jure mariti* commenced.⁴

In Georgia, it has been held that property belonging to a woman

¹ 51 Mo. 443, 447.

³ *Walker v. Walker*, 25 Mo. 367, 375.

² *Woodford v. Stephens*, 51 Mo. 443, 447; *Kidwell v. Kirkpatrick*, 70 Mo. 214.

⁴ *Ibid.*

prior to her marriage may, by the laws of the State, be reduced to possession at any time during the coverture; but it is optional for the husband to do so; and if he fails or refuses to subject it to his control, he cannot be compelled to do so by creditors or others, to the exclusion of the wife's rights or interests therein. And, notwithstanding the act of 1866, making such property the separate property of the wife, he can still reduce it to possession; but if, after the passage of that act, he reduced it to possession for her, as her estate, and in consideration of having made use of it for his own purposes, gave her a mortgage *bonâ fide*, to secure the debt so created, the lien was good, and took precedence of the subsequently-acquired liens of other creditors, although he might have been in failing circumstances.¹

In *Troxell v. Stockberger*,² it has been held that, in Pennsylvania, the fact that a husband acts as agent for his wife in buying and selling, and in investing her money, does not, without her consent, transfer her property to him. The purpose of the Pennsylvania act of 1848 is to protect a married woman in the enjoyment of her separate property. It is not necessary that her property be exclusively in her own possession. It may be in the concurrent possession of herself and her husband, without causing a forfeiture of her right of property.³

And in New Hampshire it has been held, where a husband lived on a farm owned by his wife, which he managed as her agent, and which she had bought, paying part of the price with money bequeathed to her, — securing the balance by her note and a mortgage upon the premises, and taking the conveyance to her separate use, free from the control or interference of her husband, — that proceeds of timber sold off the land by the husband for the purpose of raising funds to pay off the mortgage, there being no fraud in the matter, could not be taken in attachment for a debt of the husband.⁴

Fraudulent representations were made to a husband who was acting as agent for his wife, by means of which she was induced to buy stock at an exorbitant price. Subsequently her husband became an officer of the corporation, and much of the money which his wife had paid in for stock was paid out under the direction, and with the consent of her husband, as an officer of the company.

¹ *Grote v. Pace*, 71 Ga. 231; *Sperry v. Haslam*, 57 Ga. 442; *Archer v. Gerill*, 67 Ga. 195; *Sterling v. Sims*, 72 Ga. 51. In Georgia the Act of 1789 places real upon the same footing as personal property as to the marital rights of the husband. *Prince's Dig.* 225; *Sterling v. Sims*, 72 Ga. 54.

² 105 Pa. 405.

³ See *Holcomb v. People's Savings Bank*, 11 Norris, 338.

⁴ *Webster v. Farnum*, 60 N. H. 563. And see *Horn v. Cole*, 51 N. H. 287; *Stevens v. Dennett*, 51 N. H. 324, 333.

On a bill filed by her to set aside the sale, it was claimed that she was estopped by the acts of her husband. But the court held that a sufficient answer to that position was, that while her husband was paying out or consenting to the paying out of the money, he was not then acting as his wife's agent, but as an officer of the corporation, and that, therefore, there could be no ground of estoppel as to his wife.¹

It has been repeatedly held that while, under statutes which permit a married woman to have separate property; to make contracts, and to do business as a *feme sole*, she may avail herself of the services and agency of her husband in the conduct of her business, or in the management of her property, without necessarily subjecting it, or the profits arising from his management, to the claims of his creditors; yet an insolvent debtor may not use his wife's name as a mere device to cover and keep from his creditors the assets and profits of a mercantile business which is in truth his own.²

And from the opportunity that the marriage relation affords the husband and wife to conduct a scheme to defraud creditors, the transaction will be vigilantly scrutinized by the courts, particularly when fraud is charged. And while any device designed to cover the property or acquisitions of the husband's debtor, or to conduct his business in the name of the wife, or some member of the family, to defraud creditors, is a fraud which, when discovered, the law will not tolerate, but will brand with the mark of its condemnation; yet the mere fact that the husband gives his services to the wife in the conduct of her separate business, is not of itself sufficient to vitiate it with fraud, or to make her interest in the business or the profits arising out of it, chargeable with his debts. In *Abbey v. Deyo*,³ it was held that a husband may work for his wife in the management of her separate business or property, without any compensation, and his creditors will not thereby acquire any rights against the wife or her property. And to the same effect, it was held in *King v. Voos*,⁴ that if a husband chooses to give his services to his wife, in the management of her separate property or business, the fruit of such labor is not his but another's, and on principle, the creditor cannot seize and appropriate it to the payment of his debt. So that if a hus-

¹ *Booth v. Smith*, 117 Ill. 370.

² *Hyde v. Frey* (Ind.), 28 Fed. Rep. 819, 823. See *Brudge v. Bolin* (Ind.), 6 N. E. Rep. 140; *Cooper v. Ham*, 49 Ind. 393; *Scott v. Hudson*, 86 Ind. 288; *McLean v. Hess* (Ind.), 7 N. E. Rep. 567; *Hoot v. Sorrell*, 11 Ala. 386; *Corning v. Fowler*, 24 Iowa, 584; *Hamilton v. Light-*

ner (Iowa), 5 N. W. Rep. 689; *White v. Hildreth*, 32 Vt. 265; *Webster v. Hildreth*, 33 Vt. 457; *Voorhees v. Bonestell*, 16 Wall. 16; *Aldridge v. Muirhead*, 101 U. S. 397.

³ 44 N. Y. 343.

⁴ 14 Oreg. 91, 97.

band chooses to give his wife his services in the conduct of her separate business, the creditor, having no power over his volition, or to compel him to work for his benefit, is not defrauded. Nor is the fact of such service being rendered any ground for subjecting her interest in such business, or the profits arising out of it, to the payment of her husband's debts.¹

Where an action was brought against a husband and wife on a promissory note and a check, the signatures on which were both by the husband, he claiming that he so signed them only as agent for his wife: the court held that if he did so sign them, then they were not jointly liable, and if he did not so sign them, but signed for both as principals, they would, even then, not be jointly liable without evidence of the agency in the husband to sign his wife's name.²

Speculations in stocks and securities upon margins being held, in New Jersey, as wagers within the act to prevent gambling, unlawful;³ it was held that a promissory note and assignments of bonds and mortgages, given to a broker by a married woman, under her husband's inducements, for the purpose of being used in such gambling transactions, would, on a bill filed by the wife, be ordered to be given up by the broker (who had taken them with knowledge of the facts) to be cancelled, as being void for illegality of consideration.⁴

In *Norris v. McCarnia*,⁵ it was held that while a married woman, whose money was being used by her husband in business, might be estopped from claiming she was a partner in the business with her husband, when she had allowed her husband to use the property as his own, and when her assertion of a claim upon it as a partner would disappoint her husband's creditors, who had become such while the appearances held out were that the property was that of her husband; yet if she was estopped from claiming that she was a partner, and so entitled to an interest in the business, she was not estopped from asserting that her husband was a debtor to her, if such was the fact, for her actual advances to him as a loan.

¹ See *Cooper v. Ham*, 49 Ind. 393; *Miller v. Peck*, 18 W. Va. 81; *Buckley v. Wells*, 33 N. Y. 518; *Hossfeldt v. Dill*, 28 Minn. 469; *Dayton v. Walsh*, 47 Wis. 117; *Cubberley v. Scott*, 98 Ill. 38; *Bennett v. Stout*, 98 Ill. 47; *Lewis v. Johns*, 24 Cal. 98; *Parker v. Bates*, 29 Kans. 598; *Coon v. Rigden*, 4 Col. 275; *Martinez v. Ward*, 19 Fla. 175; *Wells v. Smith*, 54 Ga. 262; *Rankin v. West*, 25 Mich. 200;

Ploss v. Thomas, 6 Mo. App. 157; *Kutcher v. Williams* (N. J.), 3 Atl. Rep. 257.

² *Wilderman v. Rogers*, 66 Md. 127. And see *Lówekamp v. Koechling*, 64 Md. 95.

³ See *Flagg v. Baldwin*, 11 Stew. Eq. 219.

⁴ *Tantum v. Arnold*, 42 N. J. Eq. 60.

⁵ (Mich.) 29 Fed. Rep. 757.

3. HER SEPARATE PROPERTY.

The enactment of statutes recognizing the separate existence of a married woman, by securing her separate property to her exclusive use, as against the husband and his creditors, and by conferring upon her to a greater or less extent the power of entering into contracts respecting her property, and of disposing of it independently of her husband, has changed the common law in many respects, and among others the rule which was based on the idea of the legal unity of husband and wife, which disabled them from entering into contracts with each other, or from enforcing such contracts by suit.

In Rhode Island it was held that, under the provisions of their statute,¹ a married woman might purchase the property of her husband, paying for it out of her separate estate; might loan him money from her separate estate, and had the same right to expect and receive security and payment as any other creditor.² It was also held, in the same State, that if the husband and wife treat each other as lender and borrower, the contract of loan carries with it its usual incident of interest; and that the wife is entitled to be credited, in an account between her and her husband, with the proceeds of the sale of her property, although they have been applied to defray family expenses with her consent and approval.³

It has also been held there that she can acquire by purchase, or gift from a third person, the note or other obligation of the husband, given for his indebtedness, and that she is entitled to payment therefor out of the estate of the husband, precisely as such third person would have been. Should it become necessary for her to enforce payment by suit, she can do so by her next friend in equity, or through a trustee of her estate appointed by the court on her petition, under R. I. Pub. Stats., ch. 166, § 18.⁴

So, in Maine, it was held that a husband, though insolvent, might convey real estate to his wife in payment of a note which he had given her for money loaned, if there was no intent to defraud or delay creditors;⁵ and that the assignment to the wife of a mortgage given by the husband did not discharge the mortgage; but that the mortgage, and the debt secured by it, were property which she had the same right to purchase and hold as any other person could do.⁶

And in New York, that the marriage of a female mortgagee with the mortgagor, after the New York act for the protection of

¹ R. S. c. 136.

² *Steadman v. Wilbur*, 7 R. I. 481, R. I. 1.

485.

³ *Hodges v. Hodges*, 9 R. I. 32.

⁴ *Franklin Savings Bank v. Greene*, 14

⁵ *Randall v. Lunt*, 51 Me. 246.

⁶ *Bean v. Boothby*, 57 Me. 295, 302.

the rights of married women¹ had been enacted, did not extinguish her right of action upon the mortgage.²

But in Massachusetts, the common-law doctrine has not been changed by statute, and, therefore, there can be no valid contract there between husband and wife; such being a nullity.³

In Missouri, it has been held that money saved by a married woman in keeping boarders, washing and mending for them, with the consent of her husband, as well as money given her by her father, and the proceeds of land bought by her money is her own; under sects. 3295, 3296, Rev. Sts. of Missouri.⁴

But in Alabama, while, under the statutes, a married woman takes and holds property to her sole and separate use, having therein a legal estate, yet the statutes do not confer upon her a general power to dispose of such property. The power of disposition is limited, and is confined to the specific mode prescribed by the statute. The joint conveyance in writing of herself and husband, attested or acknowledged, is the only mode of disposing of such property that will operate to divest her title, whether a sale for money is intended, or the exchanging of one article of personal property for another.⁵ Hence, it was held, that where a horse belonging to a married woman had been exchanged by her husband, with her consent, but such consent had not been consummated in writing under the statute, her legal title was not divested in the one, nor did it inure to her in the other.⁶ So, in *Woods v. Dunlap*,⁷ where cattle, a part of a married woman's statutory separate estate, were exchanged for a mule and a sorghum mill, and these exchanged for a wagon and oxen, — the exchanges being made by the wife, and by her husband acting for her, and with her authority, but no writings were executed, evidencing either exchange, — it was held that the title to the wagon and oxen never vested in the woman, and, therefore, that she could not maintain trover for their conversion.

In New York, it has been held that, in all contracts relating to her separate estate, a married woman stands at law on the same footing as if unmarried, and she can, therefore, make negotiable paper which will be governed by the law merchant, and which can be sued upon in the ordinary way by general complaint, and

¹ Laws, N. Y. 1848, ch. 200.

² *Power v. Lester*, 23 N. Y. 527.

³ *Chapman v. Kellogg*, 102 Mass. 246, 248; *Abbott v. Winchester*, 105 Mass. 115. But see *Model Lodging House Assoc. v. Boston*, 114 Mass. 133.

⁴ *Bartlett v. Umfried*, 94 Mo. 530. And see *Coughlin v. Ryan*, 43 Mo. 99; *Kidwell v. Kunkpatrick*, 70 Mo. 214;

Wood v. Broadley, 76 Mo. 23; *State v. Gregory*, 14 Mo. App. 582.

⁵ *Smyth v. Oliver*, 31 Ala. 39; *Whitman v. Abernathy*, 33 Ala. 154; *Warfield v. Ravisies*, 38 Ala. 518; *Bolling v. Mock*, 35 Ala. 727; *Evans v. English*, 61 Ala. 416; *Williams v. Auerbach*, 57 Ala. 90.

⁶ *Pollak v. Graves*, 72 Ala. 347.

⁷ 73 Ala. 169.

without special statements.¹ The New York statutes² enable a woman to acquire and hold property; to bargain, sell, assign, and transfer it; to carry on any trade or business, and perform any labor or service on her own account; and they protect her in the enjoyment of her earnings from her trade, business, labor, or services, and permit her to use and invest such earnings.³

It is settled that those things which the statutes permit her to do in person, she may also do by another as her agent. This is necessarily so, for she is allowed to act in respect to them as if unmarried, and the improvement of her land, or the management of her personal property, whether for preservation or business, may be conducted by her by means of any agency which any other owner of property may employ, and the produce and increase thereof will be hers.⁴ She may do those things through her husband as her agent.⁵ And she may also have such a community of interest with her husband in relation to real estate, as will render her liable for his frauds relating to it; and when he, professing to act as her agent, makes false representations, although without her knowledge, and she receives the proceeds, she cannot retain the fruits of his fraud.⁶

In Pennsylvania, by the Act of April 3d, 1872, a married woman's separate earnings were vested in her; but to obtain the benefit of the act, it is provided that she must, by petition to the Court of Common Pleas where she resides, bring herself within the benefits of the act. It has been held under this act, that, where a married woman who has brought herself within the act, has a separate estate, and she buys property on the credit of this separate estate, she may hold it against the creditors of her husband. And it is not necessary that she should have paid for it at the time of the purchase. She is not precluded from buying on credit, provided it be on the credit of her separate estate. In all such cases it is incumbent upon her to establish the fact that the purchase was so made, to protect her title against the creditors of her husband. A married woman having no separate estate cannot, as against her husband's creditors, acquire real or personal property on her personal credit, or on the credit of her subsequent earnings. Nor does the fact that she is a *feme sole* trader modify the

Frecking v. Rolland, 53 N. Y. 422.

² Laws of 1860, ch. 90; Laws of 1862, ch. 172.

³ Noel v. Kinney, 106 N. Y. 74, 77.

⁴ Knapp v. Smith, 27 N. Y. 277, 278; Abbey v. Deyo, 44 N. Y. 343.

⁵ Rowe v. Smith, 45 N. Y. 230.

⁶ Krumm v. Beach, 96 N. Y. 398. As to the right of a married woman in

New York to form a business partnership with her husband, see Noel v. Kinney, 106 N. Y. 74; Fairlie v. Bloomingdale, 38 Hun, 229; Zimmerman v. Erhard, 58 How. 11; Graff v. Kinney, 15 Abb. N. C. 399, affirmed 37 Hun, 140; Scott v. Conway, 58 N. Y. 619; Bitter v. Rathman, 61 N. Y. 512. But see Kaufman v. Schoeffel, 37 Hun, 140.

rule as to the burden of proof being upon her to show the ownership. Where the married woman has no separate estate, property bought by her upon her individual credit, and subsequently paid for from profits in business, is to be regarded as the property of her husband, and is subject to execution by his creditors. But where she has a separate estate of her own, she may purchase property, and it will be protected as stated; and it has also been held that she may employ her husband to superintend the business and have the benefit of his skill and labor. Additional property purchased by such means belongs to her, and if it be acquired as the result of the original investment, the creditors of her husband have no right to levy upon it; she having as much right to employ her husband as she has to employ any other person.¹ And, in the same State, under their act of 1855, giving a wife the privileges of a *feme sole* trader, where her husband, from drunkenness, profligacy, or other cause, neglects or refuses to provide for his wife, or deserts her, it was held that in such a case, she is to this extent relieved from her marital duties and disabilities; that she may devote her energies on her own account, for the support of herself and her children, and has a right to her own earnings to that end.²

In Iowa, under § 3078 of their Code,³ as property exempted from execution by statute may be transferred by its owner, free from any claim of his creditors, without regard to the uses to which he devotes the proceeds, as no prejudice or injustice can be wrought to the creditor by such transfer, for the reason that the property is beyond his reach, and his conditions, rights, and remedies, would not be affected by the transfer;⁴ so, where a debtor absconds and leaves his family, the wife holds the exempt property; and her rights thereto and authority over it are the same as those of her husband when he was holding it, and her sale of such property passes the title to it.⁵

In the same State, by § 2214 of their Code, the expenses of the family are chargeable upon the property of both the husband and wife, or either of them, and in relation thereto they may be sued jointly or separately. In *Smedley v. Felt*,⁶ it was held that the purchase of a piano for use in the family is a family expense which may be charged against the property of the wife.

¹ *Baxter v. Maxwell*, 115 Pa. 469; *Gibbs & Sterret Manuf. Co. v. Goe*, 1 Pennyp. 238; *Seed v. Kahler*, 76 Pa. 262; *Spering v. Laughlin*, 113 Pa. 209. See further, *Noble v. Kreuzkamp*, 111 Pa. 68; *Hess v. Brown*, 111 Pa. 124; *Leinbach v. Templin*, 105 Pa. 522; *Keeney v. Good*, 21 Pa. 349; *Shuster v. Kaiser*, 111 Pa. 215.

² *Ellison v. Anderson*, 110 Pa. 486.

³ See sec. 3075.

⁴ *Bevan v. Hayden*, 13 Iowa, 122; *Frost v. Shaw*, 3 Ohio St. 270; *Pool v. Reed*, 15 Ala. 826; *Cook v. Baine*, 37 Ala. 350; *Godman v. Smith*, 17 Ind. 152.

⁵ *Waugh v. Bridgeford*, 69 Iowa, 334; *Malvin v. Christoph*, 54 Iowa, 562; *Rawson v. Spengler*, 62 Iowa, 59.

⁶ 41 Iowa, 588.

It has also been held that, under this section, the husband and wife are each personally liable.¹

By the Montana Code (§ 7), it is provided that the property owned by a married woman before her marriage, and the increase, use, and profits thereof, shall be exempt from all debts and liabilities of the husband, provided a list of the property of such married woman is recorded in the office of the register of deeds of the proper county.²

In *Polmer v. Murray*,³ it was held that this provision was substantially complied with where a list was filed by a woman before marriage, in her maiden name, in which she gave notice of her intended marriage; and that, as against a wrong-doer to her separate property, she had a right to sue in her own name. And it has also been held there, that creditors of a husband, whose wife has made her declaration under the statute as a sole trader, and is carrying on business in her own name and on her own account, cannot seize the money or property belonging to such business in satisfaction of the debts of the husband. The declaration, when properly recorded, is notice to the public not to trust the husband on account of the property used in the business of the wife as a sole trader. In order to impart such notice, the declaration must specifically set forth the nature of the business the wife intends to carry on and transact. But where the declaration designated the business to be carried on "as farming and ranching, keeping and maintaining a hotel, and buying and selling property, real, personal, and mixed," it was held that the married woman could, under this last clause, as well purchase a saw-mill, engine, boiler, and fixtures, as, under the previous clauses, she could have bought a cow or horse for her farm, or provisions for her hotel.⁴

And in Minnesota, a claim by a married woman for nursing her husband's boarder, under an agreement between the husband and wife that she was to be paid for such services, the boarder, however, not being cognizant of such an agreement, was sustained, there having been no question of set-off or counter-claim mixed up with the matter.⁵

In Indiana, a married woman may execute a promissory note

¹ *Smedley v. Felt*, 41 Iowa, 588; *Lawrence v. Sinnanen*, 24 Iowa, 80; *Finn v. Rose*, 12 Iowa, 565; *Jones v. Glass*, 48 Iowa, 345; *Farrer v. Emery*, 52 Iowa, 725. In *Frost v. Parker*, 65 Iowa, 178, it was held that an organ which was kept as an article of family use for several years came within this section, although it was alleged that it was bought for sale, and that the wife's lands were liable to be subjected in equity

to a judgment against her husband for the price of the organ. And see *Vandercreek v. Gere*, 69 Iowa, 467, and *Enneking v. Scholtz*, *Id.* 473, as to liabilities of the wife in connection with transactions between her and her husband.

² R. S. Mont. p. 588, § 866.

³ 6 Mont. 125.

⁴ *Shed v. Blakely*, 6 Mont. 247.

⁵ *Riley v. Mitchell*, 36 Minn. 3.

for property purchased by her, and her ability to contract there is now the rule, and disability is the exception.¹

By statute, too, in Indiana, she is expressly bound by an estoppel *in pais*. While mere representations will not estop a married woman, it has been held there that, where they are acted on in good faith by the person to whom they are made, and who has no information that would lead him to believe they are not true, they will estop her. If made to one who knows that they are not true, or to one who is chargeable with that knowledge, they will not have the effect of an estoppel. Where, however, to permit the married woman to deny what she has positively affirmed would operate as a fraud upon one who has acted in good faith, she will be held to be estopped. It may be that mere silence when she should speak will not create an estoppel, but where she makes positive representations and thus misleads one who acts in good faith, an estoppel will arise.²

But if a man colludes with the husband to secure from the wife a representation, whether in the form of an affidavit, or in any other form, he cannot insist that the wife is estopped from showing that the representation was not true.³ But such representations estop a married woman from defeating negotiable paper in the hands of a *bonâ fide* indorsee, who acquired it without notice; for value and before maturity.⁴

The earnings of a married woman arising from labor and services done and performed on her sole account become her separate property in Arkansas.⁵ It has been held there that she may sell her separate property to pay her husband's debts.⁶ She may also devote the earnings of her labor to the same purpose if she desires to do so; and where there is no other objection to the contract, an executed agreement by a married woman to pay a debt due by her husband and son for board is binding on her.⁷

A married woman purchased fixtures and furniture in her own name and with her own money, and allowed her husband to use them for the purpose of furnishing him with facilities for carrying on business in a market; he paying her rent for the articles.

¹ Arnold v. Engleman, 103 Ind. 512; Barnett v. Harshbarger, 105 Ind. 410; McLeod v. Etna Life Ins. Co., 107 Ind. 394; Chandler v. Spencer, 109 Ind. 553; Rosa v. Prather, 103 Ind. 191; Bennett v. Martingley, 110 Ind. 197; Indiana, &c. R. Co. v. Allen, 113 Ind. 581.

² Lane v. Schlemmer, 114 Ind. 296; Rogers v. Union Cent. Life Ins. Co., 27 Am. Law Reg. 48; Orr v. White, 106 Ind. 341; Vogel v. Leichner, 102 Ind. 55; Corpp v. Campbell, 103 Ind. 213; Ward v. Berkshire Life Ins. Co., 108 Ind. 301.

And see cases in note to 27 Am. Law Reg. 50, *et seq.*

³ Keller v. Orr, 106 Ind. 406.

⁴ Lane v. Schlemmer, 114 Ind. 296.

⁵ Mansf. Dig. § 4625.

⁶ Scott v. Ward, 35 Ark. 480; Roberts v. Wilcoxson, 36 Ark. 355.

⁷ Sellmeyer v. Welch, 47 Ark. 485. See Collins v. Wassell, 34 Ark. 17; Scott v. Ward, 35 Ark. 480; Roberts v. Wilcoxson, 36 Ark. 355; Walker v. Jessup, 43 Ark. 163.

The court below instructed the jury that if a married woman placed her own separate property in the hands of her husband for the purpose of carrying on his general trade, and if he so use it, then such property will be liable for the debts of her husband. But the appellate court reversed the judgment resulting from this ruling. They held that under the statutes of the State (Illinois), in respect to the rights and liabilities of married women, the husband occupies the same relation to the wife's property as does a stranger. She may sell it or loan it to him, or constitute him her agent for its management or disposition, but a gift of it by her to him will not be presumed, in the absence of proof to that effect.¹ If a stranger had purchased the property in question and loaned it to the husband to be used by him in the market, it would not be liable to be taken for the husband's debts. In the absence of fraud or collusion, the lender would still retain the title to the property as against creditors, and would have a right to retain it as against them. Under the present Illinois statutes, the wife occupies the same position, and the mere fact that she loans her property to her husband to be used in carrying on his trade or business, does not make it his property or subject it to his debts.²

A corporation in Massachusetts was summoned as trustee of a married man, and by their answer it appeared that they were indebted for washing done by his wife; that the contract for the washing was made with the defendant, but that the corporation were informed and believed that the husband, in making the contract, acted as the agent of his wife, and the corporation understood that the indebtedness was to the wife. By the statutes of that State,³ the work of washing by the wife for a person other than her husband and children must, "unless there is an express agreement on her part to the contrary, be presumed to be performed on her separate account." The court held, that, on the answer of the corporation, the case having been rested on it, it must be taken to be true that the husband acted as the agent of his wife.⁴

4. HER CONTRACTS.

The Pennsylvania Act of 1848 secured to married women their separate estates, but their earnings still belonged to their husbands.⁵ To remedy this the Act of 1872 provided that her sepa-

¹ *Tomlinson v. Matthews*, 98 Ill. 178; See *Fay v. Sears*, 111 Mass. 154, 156; *Muik v. Crilly*, 22 Ill. App. 542. *Clinton Nat. Bank v. Bright*, 126 Mass. 535.

² *Muik v. Crilly*, 22 Ill. App. 542.

³ Mass. Pub. Stat. c. 147, § 4.

⁴ *Lemond v. Arms*, 145 Mass. 195.

⁵ *Speakman's Appeal*, 71 Pa. 25.

rate earnings should inure to her separate benefit and use, and be under her control, independently of her husband, the same as if she were a *feme sole*, and be exempt from the claims of her husband and his creditors. It was held that this act conferred but a single right upon a married woman, who availed herself of the act, viz., the right to retain her earnings, from whatever source derived, as against her husband and his creditors; but that, though she is not liable upon her contracts generally, yet so far as it becomes necessary to the use and enjoyment of her separate estate, a married woman may both sue and be sued.¹ And that, in a suit against a *feme sole* trader, her husband need not be joined.²

And in a case where a married woman, within the act, kept an inn or tavern, it was held that she was liable, in an action by her bar-keeper, for his wages, on the principle that if she assumes the rights of a *feme sole*, incidentally she is also subject to the duties and liabilities of a *feme sole*, and where a married woman obtains the services and property of others in keeping a hotel, she is liable to the parties in a suit at law precisely as if she were a *feme sole*. Were it otherwise, a married woman, no matter how ample her estate, could not put a new roof on her house when necessary, nor rebuild it if destroyed. If she loaned her money out, she could not recover it back; and, on the other hand, the mechanic who repaired her roof or rebuilt her house would have no remedy to recover his money.³

But in a case under the Pennsylvania Act of 1855, giving a married woman the right and privileges of a *feme sole* trader, where her husband has neglected or refused to provide for her, and an action was brought for services in the general management of her business without proof of an agreement of hers to pay therefor, and without evidence to show that the services were necessary, she was held not liable.⁴ Yet, where a married woman owns in her own right an improved farm, she is held liable, under the Act of 1848, for services for which she contracted, which bind her separate estate, such services being necessarily required and rendered in harvesting, housing, and marketing for her benefit the growing crop on the farm.⁵

In *Bair v. Robinson*,⁶ it was held that, under the 8th section of Act of 1848, which provides that debts contracted by the wife for "articles necessary for the support of the family of the husband

¹ *Sheidle v. Weishlee*, 16 Pa. St. 134; *Murray v. Keyes*, 35 Pa. St. 384; *Lippincott v. Hopkins*, 57 Pa. St. 323.

² *Burke v. Winkle*, 2 S. & R. 189.

³ *Bovard v. Kettering*, 101 Pa. 181.

⁴ *Miller v. Glentworth*, 103 Pa. 84.

⁵ *Botts v. Knabb*, 116 Pa. 28. See *Lippincott v. Hopkins*, 57 Pa. 328; *Lippincott v. Leeds*, *Id.* 429; *Mahon v. Gornly*, 24 Pa. 80; *Germania Sav. Bk. Appeal*, 95 Pa. 329.

⁶ 108 Pa. 247.

and wife," a married woman was liable on her contract for the reasonable expenses of the burial of her mother, who had been living with them. But, under this section, a married woman is not liable for damages resulting from a breach of her contract, but only for articles actually furnished, which were necessary for the support of the family.¹

A married woman who had purchased stock in a building society, when under disability, continued to pay monthly instalments for a year and a half after the passage of an act removing her disability. It was held that she could not recover payments made by her prior to the passage of this act.²

In Connecticut, the statute of 1872³ provides that an action may be sustained against a married woman upon any contract made with her upon her personal credit, for the benefit of herself, her family, or her separate or joint estate. She was held not liable, on her contract, for supplies furnished her son and his family, who were living apart from her. The court held that the word "family" was to be taken in its ordinary and popular sense. While in a broad sense it might include all of a woman's children, whether living with her or not, and even other relatives; yet in a more limited sense, and which it was held was the sense intended by the statute, it includes only those who are living together in one household.⁴

The statute in Indiana⁵ provides that all the legal disabilities of married women to make contracts are abolished "except as herein otherwise provided." It has been held under this act that in cases of married women in that State, ability is now the rule and disability the exception;⁶ and that as the act confers on married women a general power to make executory contracts except such as are prohibited by the statute, and the purchasing of wearing apparel for herself is not prohibited by the statute, she may purchase wearing apparel for herself, and her promissory notes executed for the price which she has agreed to pay for it, are valid and may be enforced.⁷

In the construction and exposition of the New York Married Women's Acts, by the courts, it is now well defined and settled there that a married woman cannot bind herself by contract, unless, *first*, the obligation was created by her in or about carrying

¹ *Fell v. Brown*, 115 Pa. 218; *Berger v. Clark*, 79 Pa. 340; *Murray v. Keys*, 35 Pa. 384; *Park v. Kleeber*, 37 Pa. 251; *Bear's Estate*, 60 Pa. 430; *Davidson v. McCandlish*, 69 Pa. 169.

² *Dilzer v. Beethoven Building Assoc.*, 103 Pa. 86.

³ Rev. of 1875, p. 417, § 9.

⁴ *Hart v. Goldsmith*, 51 Ct. 479; *Cheshire v. Burlington*, 31 Ct. 326.

⁵ Sec. 5115.

⁶ *Rosa v. Prather*, 103 Ind. 191.

⁷ *Arnold v. Engleman*, 103 Ind. 512. See, also, *Vogel v. Lechner*, 102 Ind. 55; *Rothschild v. Raab*, 93 Ind. 488; *Wulschner v. Sells*, 87 Ind. 71.

on her trade or business; or, *second*, the contract relates to or is made for the benefit of her separate estate; or, *third*, intention to charge the separate estate is expressed in the instrument or contract by which the liability is created; or, *fourth*, the debt was created for property purchased by her.¹

In the *Third Nat. Bank v. Guenther*,² in an action upon a promissory note made by a married woman who was carrying on a mercantile business for her own account, under the management of her husband as her agent, she claimed that the note was made for the accommodation of the payees thereof, and was not created by her in or about carrying on her trade or business, and was not made for the benefit of her separate estate, and consequently that it was a void contract upon which the plaintiff could not recover. But the court held that, as upon its face it purported to be made in her separate business, being signed in the firm name in which she carried on business, and was offered and sold to the plaintiff under such circumstances as to warrant the assumption and inference on his part that it was the defendant's business paper, given for value, the defendant was estopped, as to a *bonâ fide* holder who relied upon those facts and her credit, from showing that the note was otherwise than perfectly legitimate.

The same principle was acted on in Alabama, in *Le Grand v. Eufaula Nat. Bank*,³ where a married woman was carrying on business in the name of "Stow & Co.," and it was held that she could not be permitted to deny the existence of such firm where the name had been assumed publicly, and credit obtained from the plaintiffs on the faith of its alleged existence. This is precluded by the principle of estoppel, the chief purpose of which is the promotion of common honesty and the prevention of fraud.⁴

But in the District of Columbia, their statute⁵ merely vests certain property in her as a *feme sole*, and gives no power to married women to buy and sell as *feme sole* traders; and the decisions have settled the question there that the act confers no such capacity.⁶ So, in *Hitchcock v. Richold*,⁷ where the defendant, a married woman living with her husband, was carrying on business as a retail dealer in boots and shoes, on her own account and with

¹ *Saratoga County Bank v. Pruyn*, 90 N. Y. 250. See *The Manhattan Brass and Manuf. Co. v. Thompson*, 58 N. Y. 80; *Nash v. Mitchell*, 71 N. Y. 199; *Tiemeyer v. Turnquist*, 85 N. Y. 516. All her other obligations are void. *Hudson v. Hudson*, 1 Sheld. 386; *Bogert v. Gulick*, 65 Barb. 322; *Downing v. O'Brian*, 67 Barb. 582; *Baker v. Lamb*, 11 Hun, 519.

² 13 Abb. N. C. 428.

³ 81 Ala. 123.

⁴ *Caldwell v. Smith*, 77 Ala. 157.

⁵ Rev. Sts. §§ 727, 729.

⁶ *Ritch v. Hyatt*, 3 MacArth. 536; *Schneider v. Garland*, 1 Mack. 350.

⁷ 5 Mack. 414.

her separate estate, in the District, and, for the purpose of keeping up her stock, she bought goods and gave her promissory notes for them; in an action on the notes she was held not liable.¹

In Indiana, in an action against a *feme covert*, on her promissory notes, she claimed that she signed them only as surety, and that she received no part of the consideration. The court held that while a married woman might bind herself by an executory contract, the consideration of which is personal property purchased by her for her own use, and the ownership of and title to which vest in her, even though such property be contracted for and delivered to another in her behalf, yet she cannot so bind herself, in that State, when property is purchased the title to which is to vest in another.²

A suit was brought in Louisiana against a married woman, by a niece who had been living with her aunt and her husband, for money and goods alleged to have been received by the aunt, after she had been judicially separated in property from her husband. The court below held that the wife was liable; but this decision was reversed on the ground that the receipts of the wife had not been from the representatives of the niece but from the husband, who had received the same in his capacity of "tutor" of the niece, and that he alone was liable.³

A married woman, the owner of real property as her sole and separate estate, in Missouri, may charge it in equity by the execution of a note for the payment of money, and in equity a note made by a wife payable to the husband is, in the hands of a third party, capable of enforcement as a charge against her separate estate.⁴ It follows from this, that since the Missouri act of 1875,⁵ a married woman, as to her sole and separate property, can act as a *feme sole*,—has the *jus disponendi*, and can bind herself by any contract she may make for the sale of, or by any contract for the purchase with her separate means of, personal property as her sole and separate property. Her power to purchase gives her a right to contract for the payment of the consideration so far as to charge the property with such incumbrance as may be agreed upon to secure its payment. A judgment given for this purpose was held, in Pennsylvania, not void on the ground of coverture,

¹ The court said: "The consideration of hardship and fraud upon creditors is entitled to no weight. It is their duty to know the law relating to the capacity of married women, just as they must be held to know the law as to the capacities of infants. If they deal in ignorance, they must accept the consequences. Certainly it is not for us to add to or strain this

statute. Our duty is simply to construe it." *Ibid.* 422.

² *Chandler v. Spencer*, 109 Ind. 553. See *Rothschild v. Raab*, 93 Ind. 488; *Wulschner v. Sells*, 87 Ind. 71.

³ *Glass v. Meredith*, 37 La. Ann. 625.

⁴ *Morrison v. Thistle*, 67 Mo. 596; *McQuie v. Peay*, 58 Mo. 59; *Kimm v. Weippert*, 46 Mo. 535.

⁵ Rev. Sts. § 3296.

on the principle that if a court permitted a married woman to retain property she had purchased, and at the same time refused payment of the consideration money, it would be unjust.¹ And in Missouri, recognizing the correctness of this decision, it was held that a *feme covert* is bound by her promissory note or deed of trust to secure the payment of a purchase made by her.²

In Nebraska, where, under their statute,³ a married woman is enabled to carry on business on her sole and separate account, it was held that, as the statute enables her to carry on a separate "trade or business," her defence that a promissory note given by her was not given in relation to her separate "estate," was not sufficient; that when a married woman sets up her coverture to avoid liability on her contracts, she must in her answer negative all the causes from which otherwise her liability might be inferred, as that "the contract did not concern her separate property, trade, or business."⁴

Married women have general power in Michigan to contract concerning their own property, and have been authorized to sue singly for all causes of action, and to be sued separately for all their torts. Their power to purchase on credit has been fully recognized.⁵ And where a married woman is abandoned by her husband, her contracts for family necessities will bind her.⁶ And, as such necessities, she can contract for medical attendance which she may require, as she can for food and clothing.⁷

In Oregon, sec. 10 of the Act of 1878⁸ provides that "the expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately." The general effect of this act has been to extend and enlarge the rights and liabilities of married women much beyond previous limitations. It removed the disability to make contracts and incur liabilities, which formerly existed at law; and now a married woman may do either, and her contracts and liabilities may be enforced by or

¹ Bower's Appeal, 68 Pa. 123.

² Dailey v. The Singer Manuf. Co. 88 Mo. 301.

³ Com. Sts. ch. 53, § 4.

⁴ Gillespie v. Smith, 20 Neb. 455. See Hale v. Christy, 8 Neb. 264; Davis v. First Nat. Bank of Cheyenne, 5 Neb. 242; Yale v. Dederer, 18 N. Y. 265; 22 N. Y. 450; Corn Exchange v. Babcock, 42 N. Y. 450; Savings Bank v. Scott, 10 Neb. 83; Barnum v. Young, 10 Neb. 309; Webb v. Haselton, 4 Neb. 308; Boarnman v. Graves, 23 Miss. 283; Dolin v. Hubbard, 17 Ark. 196; Nunns v. Givins, 45 Ala. 373; Todd v. Lee, 15 Wis. 380; Ballin v. Dillaye, 37 N. Y. 37; Bank v. Miller, 63 N. Y. 639;

Kimm v. Wiefert, 46 Mo. 532; Lincoln v. Rowe, 51 Mo. 571; Bank v. Taylor, 62 Mo. 338; Kantrowitz v. Prather, 31 Ind. 105; Hasheagan v. Specker, 36 Ind. 414; Hodson v. Davis, 43 Ind. 258; Shannon v. Bartholomew, 53 Ind. 54; Phillips v. Graves, 20 Ohio St. 390; Rice v. Railroad Co., 32 Ohio St. 380.

⁵ Paul v. Roberts, 50 Mich. 611; Campbell v. White, 22 Mich. 178.

⁶ Paul v. Roberts, 50 Mich. 611; Cody v. Phelps, 47 Mich. 431. See Ayer v. Warren, 47 Me. 217.

⁷ Carstens v. Hanselman, 61 Mich. 426.

⁸ Sess. Laws 1878, p. 94.

against her to the same extent and in the same manner as if she were unmarried. For liabilities incurred as a family expense, she may be sued at law jointly with her husband, or separately, and a personal judgment may be rendered against her.¹ And in *Phipps v. Kelly*,² it was held, that though there is a remedy at law which may be enforced against her for an indebtedness incurred as a family expense, for which her property may become liable, yet as there is no intent clearly manifested by the statute to exclude the jurisdiction which previously existed in equity against the separate property of a married woman, the creditor may resort to either forum to enforce his claim.³

5. HER LIABILITIES, INDEPENDENT OF HER CONTRACTS.

Under the statutes in some of the States, a *feme covert* is held liable under certain contracts to which she is not herself a party. Such is the case in Iowa, where it has been held that, in the absence of fraud and collusion between the husband and the creditors, the acts, agreements, and promises in relation to the family expenses, etc., are binding upon the wife, without any express consent or action on her part. The husband may change the form of indebtedness, as by giving his note for the account without

¹ *Watkins v. Mason*, 11 Oreg. 72. See also *Polly v. Walker*, 60 Iowa, 88; *Jones v. Glass*, 48 Iowa, 345.

² 13 Oreg. 213.

³ See *Mitchell v. Otey*, 23 Miss. 236. The case of *Lee v. Muggeridge*, 5 Taunt. 36, was an action of assumpsit based on the promise of a widow having a separate estate to pay a debt contracted on the credit of such estate during coverture. The question was whether her promise after coverture was based on sufficient consideration. Lord Mansfield said: "It has long been established that where a person is bound morally and conscientiously to pay a debt, though not legally bound, a subsequent promise to pay will give a right of action." Heath, J., said: "The notion that a promise may be supported by a moral obligation is not modern." Parke, B., in *Earle v. Oliver*, 2 Ex. 71, said: "The principle of the rule laid down by Lord Mansfield is that when the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law meant for his advantage, he may renounce the benefit of that law, and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by law to perform it." The same doctrine was held in Vermont, where

it was held that the promise of a married woman, made during coverture, who had received value to her own use from the plaintiff, who relied upon her promise to pay, and upon her separate estate as the means of enforcing pay, was by the accident of her coverture void at law, but valid in equity; that her subsequent promise to pay after coverture was clearly founded upon good consideration. *Sherwin v. Sanders*, 59 Vt. 499. In *Rusling v. Rusling*, 47 N. J. L. 1, in discussing an analogous principle, the court said: "By such a promise what before was an equitable obligation is converted into a legal obligation." And in *Vance v. Wells*, 8 Ala. 399, it was held that when goods are furnished to a married woman on the faith of her separate estate, there is such a moral obligation to pay the debt as will support an action at law, on a promise to pay after the coverture has ceased. See *Goulding v. Davidson*, 26 N. Y. 604; *La Touche v. La Touche*, 3 H. & C. 576; *Priest v. Cone*, 51 Vt. 495; *Dale v. Robinson*, 51 Vt. 20; *Hubbard v. Bugbee*, 58 Vt. 172; *Howe v. Chesley*, 56 Vt. 727; *Doss v. Peterson*, 82 Ala. 253; *Hixon v. Hetherington*, 57 Ala. 165; *Thornton v. Guice*, 73 Ala. 321; *Underwood v. Lovelace*, 61 Ala. 155.

releasing her.¹ And the husband may make such contracts for necessities without using the name of the wife, and may give his individual note therefor, for which the property of the wife will be liable.²

In *Frost v. Parker*,³ where the husband gave his note for the goods, on which a judgment was subsequently obtained against him individually, it was held, in an action in chancery to subject the wife's property to the payment of the judgment, that it was liable. And in *Phillips v. Kerby*,⁴ it was held that where the husband gives his promissory note for goods purchased and used as family supplies, the cause of action is not barred against the wife until action upon the note is barred as against the husband, and that this is true where the note has been reduced to judgment against the husband.

And in Oregon, where the statute on the subject is the same as that of Iowa, the decisions have been to the same effect. Thus it was decided in *Watkins v. Mason*,⁵ that a wife is liable for goods for family use, although sold to the husband on his individual credit; and in *Black v. Sippy*,⁶ that the wife is liable for necessities incurred as a family expense, although originally charged to the husband, and for which he had given his note; nor would the transfer of the note discharge her from liability.

A married woman in Oregon objected that she could not be joined with her husband as a co-defendant, in an action for the possession of real property of which both were alleged to be in the occupation. The objection was founded on the theory that, by the common law, her identity was so merged in his that she could not have possession of such property independently of him. But the Supreme Court of the United States decided that if there were any such rule of the common law, it has been abolished in Oregon. By statute of that State of 1880, all laws which impose or recognize any civil disabilities of the wife, not imposed or recognized as to the husband, were repealed, except that the right to vote and hold office was not conferred upon her. And "for any unjust usurpation of her property or natural rights," she was declared to have the same right to appeal to the courts of law and equity for redress, that the husband has. And as in that State she can hold property jointly with him, or separately from him, therefore, if she is in possession with him of property which rightfully belongs to another, she may be jointly sued with him for its recovery.⁷

¹ *Lawrence v. Sinnamon*, 24 Iowa, 80.

² *Smedley v. Felt*, 41 Iowa, 590.

³ 65 Iowa, 180.

⁴ 34 N. W. Rep. 855.

⁵ 11 Oreg. 72.

⁶ 15 Oreg. 574.

⁷ *Barrell v. Tilton*, 119 U. S. 637.

Under an act similar to that which is in force in Iowa and Oregon, it was claimed in Illinois that the statute imposes no personal liability upon the wife for family expenses, but merely creates a charge upon her property which can be enforced only by proceedings *in rem* against such property as she was owning at the time the indebtedness was incurred. But it was decided, in accordance with the decisions in Oregon and Iowa, that, independent of the provisions of the statute, the husband was personally liable for indebtedness incurred for the expenses of the family, and the statute, by providing that the wife may be sued jointly with him in respect to such indebtedness, necessarily imposes upon her a liability precisely commensurate with his, which is a personal liability, as upon no other principle can effect be given to the statute.¹

In a later case in the same State (Oregon), it was claimed for the wife that she was not liable under the statute, unless (1) the articles were actual necessities, and purchased for the family with her consent, and (2) unless they were purchased for the family, and not for the personal use of the husband. But the court held that the construction of the section does not limit the liability of the property of the wife to expenditures for *necessary* family expenses. It applies to the expenses of the family without limitation or qualification as to kind or amount, and does not depend upon the wealth, habits, or social position of the party. The husband is the head of the family. He determines primarily what is needed for it. He may buy, furnish, contract debts, all in his own name, for the support and welfare of the family. His wife's name need not be known, and his acts and agreements are alike obligatory upon both. The consent and action of both is not required that goods purchased for any individual member of a family, and used by him exclusively, shall constitute a family expense within the meaning of the section.²

In *Dunn v. Pickard*,³ a married woman claimed that she was not liable under the act for the price of a two-horse double-seated buggy, sold to her husband on the ground that it was not a "family expense" within the meaning of the act. The Supreme Court of the State of Iowa has held that a cook-stove and fixtures used in the family, provisions and clothing, a piano, a lady's gold watch and a chain, an organ, a sewing-machine used in the family, are

¹ *Hayden v. Rogers*, 22 Ill. App. 557; *Smedley v. Felt*, 43 Iowa, 607; *Smedley v. Felt*, 41 Iowa, 588; *Jones v. Glass*, 48 Iowa, 345; *Marquardt v. Flaughter*, 60 Iowa, 148.

² *Hudson v. King*, 23 Ill. App. 118. See *Von Platen v. Krueger*, 11 Ill. App. 627; *Marquardt v. Flaughter*, 60 Iowa, 148; *Lawrence v. Simmon*, 24 Iowa, 80.

³ 24 Ill. App. 423.

expenses of the family within the meaning of the statute.¹ But that a reaping-machine, merchandise, and live stock, and a breaking plow, money borrowed to pay family expenses, attorney's fees, and the expenses of an insane wife in a hospital, were not family expenses under the law.² And the Illinois Court of Appeal, reversing the decision of the Circuit Court, held that the law, by judicial construction, should not be carried further than it had been; that the buggy was not a "family expense" fairly within the meaning of the statute, and that the wife was not liable.³

In North Carolina, where a married woman is similarly made liable under their code⁴ "for the support of the family," it was held that she is not liable for family supplies procured to keep up a boarding-house; that her liability is confined to goods bought for the direct benefit of the members of the family, such as food, clothing, and other necessities, and not for the successful prosecution of a business, from the profits of which such support is to be obtained, whether by keeping a boarding-house or hotel, or by engaging in any other general occupation.⁵ She may become a free-trader with her husband's approval, and thus emancipate herself from the restraints of her coverture, under § 1827 of the code; but otherwise she can only exercise the power given her by the act over her separate estate in entering into an executory contract with others.⁶

By the Code of Mississippi of 1880,⁷ it is declared that unless by written, acknowledged, and recorded contract between husband and wife, that relationship be changed, the husband, transacting business with the means of the wife, as to all persons dealing with him without notice, shall be held and treated as her agent and manager in business. It was held that, by fair and necessary implication from this statute, it secures to creditors the right to hold the wife to answer for all debts contracted by her husband with her means in all cases in which there is not a recorded contract or notice to the creditor. If the credit is given to the husband, as her agent, she is chargeable as a known principal. If it be extended to the husband in ignorance of the facts, she is liable on discovery as an undisclosed principal. But she is responsible as an undisclosed principal for those items on the account, and

¹ *Fun v. Rose*, 12 Iowa, 567; *Hawke v. Urban*, 18 Iowa, 83; *Smedley v. Felt*, 41 Iowa, 588; *Marquardt v. Flangher*, 60 Iowa, 148; *Frost v. Baker*, 65 Iowa, 178.

² *McCormick v. Merth*, 49 Iowa, 536; *Russell v. Long*, 52 Iowa, 250; *Davis v. Ritchie*, 55 Iowa, 719; *Fitzgerald v. McCarty*, *Ib.* 702; *Delaware Co. v. McDowell*, 46 Iowa, 170.

³ *Dunn v. Pickard*, 24 Ill. App. 423, 427.

⁴ § 1826.

⁵ *Clark v. Hay*, 98 N. C. 421.

⁶ *Dougherty v. Sprinkle*, 88 N. C. 300; *Webster v. Laws*, 89 N. C. 225; *State v. Lanier*, 89 N. C. 517.

⁷ § 1177.

those only, bought for the use and benefit of the business transacted with her property, and the burden of proof is upon the sellers to show what items fall within that class.¹

But the common-law obligation of the husband to provide supplies for his family is not changed or modified by the statute, which has relation only to the debts contracted in the business in which the wife's property is employed; nor is the wife's estate to be subjected to the payment of debts contracted by the husband for family supplies, on the ground that he, by devoting himself to her affairs, disables himself from making provision for the support of the family.² Yet the ordinary incidents connected with the relationship of principal and agent apply to them; and where the husband is dealt with as the agent of the wife, and the goods sold are such as fall within the scope of his apparent power to purchase, the wife will be liable, where the creditor sells to him in good faith as agent, though the goods purchased be appropriated for the support of the family; for this is a matter to be settled between the principal and agent, and the rights of the creditor are not to be affected by any subsequent misappropriation by the agent either to his own use or to that of a third person.³

A married woman in Kansas advanced money to her husband with which he bought goods. Subsequently, on selling the goods, the purchaser in part payment therefor conveyed lands to the wife, which were afterwards sold. The court held, that even if there had been fraud between the husband and wife in the transaction, while that might have been a ground to set aside the transaction itself, it did not make other property of the wife, which she had owned long prior to the purchase of the goods, liable to the creditors of the husband for his debts.⁴

In Tennessee, a stock of goods was conveyed to a married woman by her father, with which her husband, in the name of his wife and ostensibly as her agent, carried on business. He purchased other goods in the name of his wife, for which he gave a promissory note in her name. The note not having been paid, the plaintiffs filed a bill in chancery, seeking to charge the wife's separate estate for the amount of the note; her plea of coverture there being an answer to an action at law, as she is not chargeable personally with such debts,⁵ it being conceded that there was nothing in the contract stipulating for or creating a lien on the wife's separate estate.⁶ The court held that the contract of sale

¹ *Pater v. Staten*, 64 Miss. 421.

² *Caldwell v. Hart*, 57 Miss. 123.

³ *Pater v. Staten*, 64 Miss. 421, 426;
Caldwell v. Hart, 57 Miss. 123.

⁴ *McKinney v. Ward*, 39 Kan. 279.

⁵ *Jackson v. Rutledge*, 71 Tenn. 626,
629.

⁶ *Ragsdale v. Gossett*, 70 Tenn. 729,
736.

having been repudiated by the wife, the title to the goods sold would be in the vendors, and that chancery would compel the return of the property if in the possession or under the control of the *feme*,¹ but that other goods belonging to her could not be charged with such a liability.²

Down to 1887³ the common-law rule prevailed in Alabama, that the earnings of the wife, or such property as she acquired by her labor, skill, or economy, belonged to her husband; the law regarding her merely as a servant.⁴ But the husband might contract with her, upon a sufficient consideration, to release such earnings, or he might by gift invest her with a separate estate in them; and such renunciation of his marital rights, in the absence of actual fraud, will be upheld as valid, except as against existing creditors, who may avoid such gift as they could any other voluntary transfer or conveyance.⁵ All that is required to this end is, that the evidence of the gift must have been clear, and it must have been apparent that the husband intended to divest himself of all right to them, and to set them apart to the separate use of the wife; the essence of the whole transaction being the assent of the husband, clearly and satisfactorily manifested; and this may be shown by evidence that the husband permitted the wife to carry on a trade or business, in her sole name and on her sole account, without any participation or interference on his part.⁶ And lands conveyed to a married woman after debts had been contracted by her husband, but paid for by her out of profits and earnings, which she had prior to the accrual of such debts, derived from her trade as a milliner, and constituting part of her separate estate, by reason of the assent of her husband that they should be hers and enure to her separate estate, were not liable to such debts.⁷ And it has been held there that the husband may lawfully spend his own personal labor in improving the wife's estate, without any fraud on his creditors.⁸ And he may, with equal right and justice, permit his wife to enhance the value of her own property by her personal industry, and no creditor can complain of the act as a fraud on his rights.⁹

Where a woman after her husband's death paid off all of his debts except one, and it was not proved that this was done in

¹ See *Nichol v. Steger*, 76 Tenn. 393, affirming same case, 2 Tenn. Ch. 323.

² *Federlicht v. Glass*, 81 Tenn. 481.

³ Ala. Acts 1886-1887, p. 80.

⁴ *Gordon v. Tweedy*, 71 Ala. 202; *Evans v. Covington*, 70 Ala. 440; *Carleton v. Rivers*, 54 Ala. 467.

⁵ *Wing v. Roswald*, 74 Ala. 346; *Pinkston v. McLemore*, 31 Ala. 308; *Cohalan v. Monroe*, 70 Ala. 271.

⁶ *Evans v. Covington*, 70 Ala. 440, 442; *Shaeffer v. Sheppard*, 54 Ala. 244.

⁷ *Carter v. Worthington*, 82 Ala. 334. See also *Wing v. Roswald*, 74 Ala. 346; *McLemore v. Nuckolls*, 37 Ala. 662.

⁸ *Holt v. Sorrell*, 11 Ala. 386.

⁹ *Sharp v. Sharp*, 76 Ala. 312; *Allen v. Terry*, 73 Ala. 123; *Crockett v. Lide*, 74 Ala. 301; *Lee v. Tannerbaum*, 62 Ala. 501.

pursuance of an acknowledgment of an obligation to pay them, the mere fact that she paid all such debts but one would not tend to establish a liability on her part to pay that one.¹

¹ *Briswalter v. Palomares*, 66 Cal. 259. See, further, as to a married woman charging her separate estate, *Solomon v. Garland*, 2 Mack. (D. C.) 113; *Stewart v. Smith*, 3 Mack. 281; *Cookson v. Toole*, 59 Ill. 515; *Spering v. Laughlin*, 113 Penn. 209; *Zurn v. Noedel*, 113 Penn. 336; *Fowler v. Jacob*, 62 Md. 326; *Damón v. Deeves*, 57

Mich. 247; *Hubbard v. Bugbee*, 58 Vt. 172; *Rood v. Willey*, 58 Vt. 474; *Habenicht v. Rawls*, 24 S. C. 461; *Bank of Louisville v. Gray*, 84 Ky. 565; *Jordan v. Keeble*, 85 Tenn. 412; *Warren v. Freeman*, *Id.* 513; *Eckerley v. McGhee*, *Id.* 661.

BOOK II.

PART IV.

PURCHASES AND SALES BY SHIPMASTERS AS AGENTS OF NECESSITY.

By the civil law the master of the ship had power to impawn the ship and tackle in case of necessity, if he had no other means to provide such things as were necessary for her; and, early in the seventeenth century, as far back as the time of Hobart, the same principle was declared to be a part of the common law of England.¹

In another old case² it is laid down that if the master of a ship contracts for the necessary repairs thereof, this binds the owner; although in that case the master was not obliged to repair it, yet, inasmuch as the repairs were necessary to save the ship from foundering, the law enables him to bind the defendant by his contract.

As the authority which the master possesses is purely one which arises from the necessities of the case, the legality of his acts in any particular case will depend upon the fact, whether under the circumstances such necessity existed. If it did exist his authority is very extensive. Thus, when the safety of the ship requires it, he can jettison the deck-load or any other part of the cargo; he can sell the cargo or any necessary part of it; he can have the ship repaired, and for such purpose can purchase such materials and have such work done as may be necessary; he can agree as to the terms of the salvage³ of the ship and cargo,

¹ Bridgeman's Case, Hob. 11.

² Manby v. Scott, 1 Sid. 109.

³ In the case of *Honseman v. The Schooner North Carolina*, 15 Peters, 40, the United States Supreme Court stated the well-established principles governing the rights of the master as an agent of necessity in cases of salvage, as follows: "We have no doubt that there may be cases in which the contract of the captain in relation to the amount of salvage to be paid to the salvors, or his agreement to

refer the question to arbitrators, would bind the owners. In times of disaster it is always his duty to exercise his best judgment, and to use his best exertions for the benefit of the owners of both vessel and cargo; and when from his situation he is unable to consult them or their agent without an inconvenient and injurious delay, it is in his power to compromise a question of salvage, and he is not bound in all cases to wait for the decision of a court of admiralty. So, too, when

and, in extreme cases, he can sell and pass a valid title to the property in both ship and cargo. The principles by which he is to be governed in such cases will appear by the authorities we cite.

The sale of a ship becomes a necessity within the meaning of the commercial law, when nothing better can be done for the owner or those concerned in the adventure. If the master, on his part, has an honest purpose to serve those who are interested in ship and cargo, and can clearly prove that the condition of his vessel required him to sell, then he is justified. As the power is liable to abuse, it must be exercised in the most perfect good faith, and it is the duty of courts and juries to watch with great care the conduct of the master. In order to justify the sale, good faith in making it and the necessity for it must both concur, and the purchaser, to protect his title, must be able to show this concurrence. The question is not whether it is expedient to break up a voyage and sell the ship, but whether there was a legal necessity to do it. If this can be shown, the master is justified; otherwise not. And this necessity is a question of fact, to be determined in each case by the circumstances in which the master is placed, and the perils to which the property is exposed. If the master can within a reasonable time consult the owners, he is required to do it, because they should have an opportunity to decide whether, in their judgment, a sale is necessary. And he should never sell, when in port with a disabled ship, without first calling to his aid disinterested persons of skill and experience, who are competent to advise, after a full survey of the vessel and her injuries, whether she had better be repaired or sold. And although his authority to sell does not depend on their recommendation, yet, if they advise a sale, and he acts on their advice, he is in a condition to furnish the court or jury reviewing the proceedings, strong evidence in justification of his conduct.¹

These principles were applied in the case of *The Amelie*. There, when the voyage began, the ship was seaworthy and well provided, but after she had been at sea a short time she became

the salvage service has not been important, and the compensation demanded is a small one, it may often be the interest of the owners that the amount should be settled at once by the captain, and the vessel proceed on her voyage, without waiting even a day for the purpose of consulting them. But in all such cases, unless the acts of the captain are ratified by the owners, his conduct will be carefully watched and scrutinized by the court, and his contracts will not be regarded as binding upon the parties concerned unless they appear to have been *bonâ fide*, and such

as a discreet owner placed in the like circumstances would probably have made. If he settles the amount by agreement, those who claim under it must show that the salvage allowed was reasonable and just. If he refers it to arbitrators, those who claim the benefit of the award must show that the proceedings were fair and the referees worthy of the trust." In this case the acts of the master were very strongly condemned, and set aside as unjustifiable and illegal.

¹ *The Amelie*, 6 Wall. 18.

disabled during a violent storm, and with great difficulty was taken into the harbor of Port au Prince. The master at once entered his protest before the Dutch consul-general (the ship being owned in Amsterdam), who caused three surveys to be made of the condition of the vessel. No action was taken on the first survey, but the result of the second was the incurring of an expense of \$1000 in partial repairs, decided by the surveyors to be practicable, who recommended the partial repairs in order that the ship should be put in a proper condition to proceed on her voyage to Boston. In making these partial repairs, one of the sides of the vessel was uncovered, disclosing additional damages of a serious character, not previously ascertainable, which caused the consul-general to order a third survey. This third and final survey was thorough and complete, and was made by Lloyd's agent, the agent of the New York underwriters, and three masters of vessels, who reported fully on the facts, and advised that the vessel should be sold. The vessel was accordingly sold at public auction for \$407. The purchaser took possession, repaired her at a cost of \$1695.31, and sent her to Boston. She was then libelled by one Fitz, a cargo owner, part of whose cargo had been sold by the master without accounting for it. The vessel was sold for \$2138; the purchaser expended \$143 for additional repairs, took off her copper, which he sold for \$1157, and sent her to England, where she arrived after a good deal of bad weather, appearing staunch and strong. Fitz claimed the proceeds of the sale. The District Court dismissed the claim, and the decree was affirmed by the Circuit Court. On appeal to the Supreme Court, the decision of the courts below was sustained. The court held that, after the advice given in their report by the surveyors, than whom no person could be more competent to advise, or from the nature of their employment better acquainted with the structure of vessels and the cost of repairing them, the master, who was bound to look to the interest of all parties concerned in the adventure, had no alternative but to sell. In the face of the report, had he proceeded to repair his vessel, he would have been culpable. Being in a distant port with a disabled vessel, seeking a solution of the difficulties surrounding him, at a great distance from his owners, with no direct means of communicating with them, and having good reason to believe the copper of his vessel was displaced, and that worms would work her destruction, his most proper course to pursue was to obtain the advice "of that body of men who, by the usage of trade, have been immemorially resorted to on such occasions."¹ The court were of the opinion that no prudent man,

¹ *Gordon v. Mass. Ins. Co.*, 2 Pick. 264.

under the circumstances, would have failed to follow their advice, and the state of things as proved in this case imposed on the master a moral necessity to sell his vessel and reship his cargo.¹

¹ The court continued: "But it is said, the fact that the vessel was repaired by the purchaser and sent to Boston disproves this necessity. Not so. It may tend to prove that the surveyors were mistaken, but does not affect the question of the duty of the master to follow their advice, when given in such strong terms, and with no evidence before him that it was erroneous. But, in fact, the surveyors did not err in their conclusion that the vessel was not worth the cost of repairs, as the amount in the registry of the court for which the vessel was sold in Boston will fail to reimburse the claimant the money expended by him in purchasing and repairing her." *The Amelia*, 6 Wall. at p. 29. See *The Glasgow*, 1 Swabey, 150; *The Australia*, *Id.* 484; *The Margaret Mitchell*, *Id.* 382.

In dealing with the power of the master of a ship to bind the cargo for necessities, in *The Gaetano and Maria*, L. R. 7 Pr. Div. 137, 145, Brett, L. J., said: "I doubt myself (but it is not necessary to decide it in this case) whether the master is ever the agent of the owner of the cargo. The master is the agent of the owner of the ship, and it may be that the master, as agent of the owner of the ship, has certain rights with regard to the cargo. But suppose that the master can be, under circumstances of necessity, the agent of the owner of the cargo, out of what does the authority of the master arise? Now, this authority of the master of the ship to hypothecate the ship or cargo is peculiar. It does not arise merely out of a contract of bailment, for that contract gives no such right. It does not arise even out of a contract of carriage on land. I doubt whether it arises on a contract of sea carriage, where it is all within the realm; but it is not necessary that this should be now decided. It does arise where goods are shipped on board a ship to be carried from one country to another. That is acknowledged by the maritime law of England, and, as far as I know, is equally acknowledged in every maritime country. *It arises from the necessity of things*; it arises from the obligation of the shipowner and the master to carry the goods from one country to another, and from it being inevitable from the nature of things that the ship and cargo may, at some time or other, be in a strange port, where the captain may be without means, and where the shipowner may have no credit, because he is not known there; that, for the safety of all concerned and for the carry-

ing out of the ultimate object of the whole adventure, there must be a power in the master not only to hypothecate the ship, but the cargo. That power of the master does not arise out of the bill of lading, nor out of the charter-party, because it may exist where there is neither bill of lading nor charter-party. It arises out of the contract of maritime carriage, by the shipment of goods on board a ship for the purpose of being carried from one country to another, and it exists the moment the goods are put on board for such a purpose. It is regulated, and often limited, by terms in the bill of lading, or by terms in the charter-party; but unless such terms specifically do away with this authority of the master, the authority of the master exists by virtue of the contract which arises between the shipowner and the cargo-owner by the shipment of the goods. It is not necessary to decide whether this authority is given to the master by way of contract or by means of the law." Then, again, as to the law in the matter, when the ship is an English ship: "Now, if this ship had been an English ship, if the captain had been an English master, and if the owners of the cargo had been English subjects, there is no doubt that the master would have had no authority to bind the owners of the cargo unless certain necessities had arisen. The ship must have been in a state of distress, and in a port of distress where the owner of her had no means or credit by which to find the money required for doing the necessary repairs; and besides this, in order to require the hypothecation by bottomry of the cargo, the value of the ship must not of itself be large enough. Moreover, if this had been an English ship and an English captain, even though all these necessities had existed, yet the master would not be authorized to charge the cargo if before doing so he had the means of communicating with the owner of the cargo within a reasonable time, so that on receiving notice the owner of the cargo might determine whether he would allow the cargo to be bottomried, or whether he would take other means for the disposal of the cargo." *The Gaetano and Maria*, L. R. 7 Pr. Div. at p. 143. See *The Hamburg*, Br. & Lush. 253; *The Gratitude*, 3 Rob. Adm. 240; *The Buonaparte*, 8 Moo. P. C. 459; *Lloyd v. Guibert*, L. R. 1 Q. B. 115; *The Karnak*, L. R. 2 P. C. 505; *Kleinmoort v. The Cassa Marittima*, 2 App. Cas. 156.

The principles relating to the right of

The *Lizzie* sailed from Minatitlan, January, 1866, with a cargo of mahogany and cedar, for the United Kingdom. Having suf-

ficiently the shipmaster to sell the ship and her apparel are considered by the United States Supreme Court in *The New England Insurance Co. v. The Sarah Ann*, 13 Peters, 387. As the whole question is considered by the court in their inquiry as to what is the right of the master to sell a ship in the event of an admitted stranding, we quote fully from their judgment, in which they say: "This involves the necessity for a sale, in the circumstances under which it is done, to make it justifiable in the master, or otherwise. All will agree that the master must act in good faith, exercise his best discretion for the benefit of all concerned, and that it can only be done upon the compulsion of a necessity, to be determined in each case by the actual and impending peril to which the vessel is exposed; from which it is probable, in the opinion of persons competent to judge, that the vessel cannot be saved. This is, as it is decided in some of the English courts, an extreme necessity. The master must have the best information which can be got, and must act with the most pure good faith. So says Lord Ellenborough, in *Hayman v. Molton*, 5 Esp. 65.

"It is also properly termed a moral necessity, because when the peril and information concur, as we have just stated, it then becomes an 'urgent duty upon the master to sell for the preservation of the interest of all concerned.' It should not be termed a legal necessity, as it is in the argument of the counsel for the libellants; for though the necessity, information, and good faith of the master will make the sale legal, the term 'legal' is not descriptive of the prerequisite upon which the master's right to sell depends. Nor can the necessity for a sale be denied when the peril, in the opinions of those capable of forming a judgment, makes a loss probable; though the vessel may, in a short time afterwards, be got off and put afloat. It is true, the opinion or judgment of competent persons may be falsified by the event, and that their judgment may be shown to have been erroneous by the better knowledge of other persons, showing it was probable the vessel could have been extricated from her peril, without great injury, or incurring great expense; and the master's incompetency to form a judgment or to act with a proper discretion in the case, may be shown. But from the mere fact of the vessel having been extricated from her peril, no presumption can be raised of the master's incompetency, or that of his ad-

visers. It is right, also, to test the peril in which the vessel may be, by information of the locality where she is stranded, by the season of the year, and by a comparison of the number of vessels lost or saved which have been driven on the same beach or shoal. But in doing so, though it shall be found that a larger number of vessels stranded have been got off than were lost on the same beach, it is very difficult, in a case of stranding upon a shifting beach of sand, with the wind blowing hard on shore, and in a month when the winds are usually strong and stormy, to disprove the necessity for the master to sell by what may have happened in other cases. The evidence taken in this case establishes that five to one of the vessels stranded where the *Sarah Ann* was driven on the beach have been altogether lost. The evidence in such a case, and under such proof of the loss of vessels there, must be very strong before it can prevail to show that there was no necessity for the master to sell. It must also be proved, in a particular case given, that the means in the master's power, or which he may command from those to get his vessel off, had not been applied, and that there would have been what we shall call, and what ought to be so esteemed, a controlling difference between the value of the vessel, as her condition may be when she is sold, and the expense to be incurred in getting her off. Nor will any ascertainment of the cost of repairs, subsequent to the extrication of the vessel, raise a presumption against the necessity to sell, whatever may be her condition as to strength, and though she may not be injured in the hull, if the actual and immediate prospective danger menaces a probable total loss. We think such was the *Sarah Ann's* danger. The court, then, having stated its opinion as to what makes an extreme necessity, it follows that it cannot be laid down as a universal rule, that the master's power to sell is limited to cases of extreme necessity in a foreign port, or in a port of the United States of a different State than that to which the vessel belongs, or in which her owners may be or reside when the necessity occurs.

"The true criterion for determining the occurrence of the master's authority to sell, is the inquiry whether the owners or insurers, when they are not distant from the scene of stranding, can, by the earliest use of the ordinary means to convey intelligence, be informed of the situation of the vessel in time to direct the master

ferred sea damage, she put into Key West, Feb. 27, and there properly underwent some necessary repairs which detained her until May 21. The master, not being able to raise money on personal security to defray the expenses of the repairs, gave a bottomry bond, dated May 19, on the ship, freight, and cargo. The master, before hypothecating, did not communicate with the owner or consignees of the cargo by reason of the great delay and uncertainty in the transmission of letters from Key West at that time. The vessel sailed on May 21, and arrived at her port of destination on July 2. A suit having been instituted against the vessel for freight and cargo by the holders of the bottomry bond, the validity of which was contested by the consignees of the cargo, it was held that, under the circumstances, the master was not bound to communicate with the consignees before hypothecating, and that, therefore, the bond was binding on the cargo.¹

before she will probably be lost. If there is a probability of loss, and it is made more hazardous by every day's delay, the master may then act promptly, to save something for the benefit of all concerned, though but little may be saved. There is no way of doing so more effectual than by exposing the vessel for sale; by which the enterprise of such men is brought into competition as are accustomed to encounter such risks, and who know from experience how to estimate the probable profits and losses of such adventures. And we here say that the power of the master to sell the hull of his stranded vessel exists also as to her rigging and sails, which he may have stripped from her, after unsuccessful efforts to get her afloat; or when his vessel, in his own judgment and that of others competent to form an opinion and to advise, cannot be delivered from her peril. The presumption is that they are injured; they can never again be applied to the use of the vessel, and they must ordinarily become, from day to day, of less value. In fact, they are a part of the vessel when stripped from her, and the mere fact of separation by the vigilance and efforts of the master, by which they are saved from the ocean, does not take them out of his implied power to sell in a case of necessity. The necessity does not, as has been supposed, mean that no part of her tackle, apparel, or furniture saved shall be sold, because they are no longer liable to loss; but when they are saved, whether a sound discretion does not require them to be sold for the benefit of all concerned.

"If, however, the master sells without good faith, or without a sound discretion, the owners may, against the purchaser, assert their right of property in the sails

and rigging; as they may, in any case of a stranded vessel, which has been sold without good faith in the master, with her sails and rigging standing. We do not think the case of *Scull v. Bridle*, 2 Wash. C. C. Rep. 150, notwithstanding our respect for the memory of the eminent judge who made it, sound law. It is expressed in terms too broad. The mischievous consequences apprehended may be controlled in each case by such proof as we are obliged to depend upon to maintain and secure from abuse other interests, equally important to society in general as to individuals engaged in some particular pursuit. We think the interest of owners of vessels in cases of a sale by the master, when pressed to make it by necessity arising from the perils of the sea, is amply protected; and that the power of the master to sell is secured from abuse by the limitations placed upon the exercise of it, and by the obligation of the purchaser at the sale to maintain his ownership against the claim of the original owner, by showing that the necessity for a sale had arisen; that it was made in the good faith and sound discretion of the master. This certainly, in the case of such sales at home, gives to the owners of a stranded vessel a stronger guard against imposition and fraud, than they can have in sales made in a foreign port; and serves to support the correctness of the opinion that the master's power to sell is not confined to a foreign port, or to a stranding in another State. This doctrine holds out no encouragement to the master to sell; it gives him no facility to sell, when it is not authorized by necessity clearly made out, and exercised with good faith and sound discretion."

¹ The *Lizzie*, L. R. 2 Ad. & Ec. 254.

The following principles were acted on in the case of *The Karnak*:¹ 1. That it is the duty of the master before resorting to bottomry, to communicate or to endeavor to communicate with the owners of the cargo as well as with the owners of the ship, if, in the circumstances, it be feasible. 2. Where a master fails to obtain funds from the owner to pay for repairs which the necessities of the ship compel him to order, he is warranted in raising money on bottomry of ship, freight, and cargo for that purpose from persons other than those who had supplied such repairs. 3. In the case of a bottomry bond for money already supplied without any previous agreement, it is to be presumed, in the absence of all evidence, that the foreign lender made his advances in contemplation of bottomry security, and this presumption is increased where the *lex loci* empowers the lender to arrest the ship in satisfaction of his demand. 4. The question whether money advanced is to be considered a loan or an advance of freight, must principally depend upon what appears upon the face of the instrument.²

In delivering the judgment in this case Sir Robert Phillimore said: "Now the principles of law which I must apply to this case are those laid down by the lords of the Privy Council in *The Buonaparte*, 8 Moo. P. C. 459, and *The Hamburg*, Brow. & Lush. 253. There is no doubt that, according to the authority of these cases, as well as that of the *Gratitudine*, which they followed, *the character of agent for the owners of the cargo is imposed upon the master by the necessity of the case, and by that alone*. And by the two former cases it is now established as a necessary consequence of that proposition that the master, before he hypothecates the cargo, ought, if he have according to reasonable intentment the means of doing so, to communicate with the owner." Two reasons for this are suggested, namely, to give the owner the opportunity of advancing the necessary funds or of unloading the cargo altogether; and then Sir Robert Phillimore proceeds: "If there be no opportunity for the owners to express their will as to either of these two grounds with respect to their cargo, the master, *who is the agent of necessity, and not of their choice*, has no right to deprive them of this opportunity, and, therefore, must communicate with them if it be reasonably within his power to do so." *The Lizzie*, L. R. 2 Ad. & Ec. at p. 258. In the case of *The Hamburg*, Brow. & Lush. at p. 274, the court said: "Where the cargo belongs to a single individual known to the master; the ship in a port in the same country or near to it in which that owner is resident; the means of communication

sure and speedy; the probable delay inconsiderable; the cargo not of a perishable kind; the money to be borrowed so large as to be sure to bring it within the operation of the bond, it could not be contended that the master could properly hypothecate it for the repairs of the vessel without first communicating with the owner. Equally clear it is that where all these circumstances were reversed, no such duty would be incumbent on him. . . . What is in effect the practical conclusion but that the question whether a master must communicate or not is one which can only be decided by the circumstances in each particular case."

¹ L. R. 2 Ad. & Ec. 289.

² In this case Sir Robert Phillimore, in fully discussing the nature and extent of the power of the shipmaster to bind the ship and cargo by his contracts for necessities, says: "This power of the master arises out of his relation as agent both to the owner of the ship and to the owner of the cargo. A material distinction, indeed, exists between his authority as agent for the one and as agent for the other; but in both cases his power to hypothecate, like his power to sell, arises out of the necessity of the case." The cardinal principle is that "necessity is the foundation of the master's authority in the matter." *The Karnak*, L. R. 2 Ad. & Ec. 289, 299. Lord Stowell says: "Necessity creates the law. It supersedes the rules, and whatever is reasonable and just in such cases is likewise legal." *The Alexander*, 1 Dodson, 278. In *Beldon v. Campbell*, 6 Exch. 886, Parke, B., said: "The master is ap-

A vessel being in distress at Cuba, the master applied to B.'s agents there for an advance of money for necessary repairs. The agents, after telegraphing to B., who resided at Liverpool, received B.'s authority to make the advance on bottomry of the vessel, and this was done. B. was second mortgagee of the vessel, and knew at the time he authorized the advance that the owner was insolvent, and that he and the first mortgagee both resided in Liverpool; but before authorizing the advance, he did not, nor did the

pointed for the purpose of conducting the navigation of the ship to a favorable termination, and he has, as incident to that employment, a right to bind his owner for all that is necessary, — that is, upon the legal maxim, '*quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud.*' Consequently the master has perfect authority to bind his principal, the owner, as to all the repairs necessary for the purpose of bringing the ship to its port of destination; and he has also power, as incidental to his appointment, to borrow money, but only in cases where ready money is necessary, that is to say, where certain payments must be made in the course of the voyage, and for which ready money is required. An instance of this is the payment of port dues, which are required to be paid in cash, or lights, or any other dues which require immediate cash payments. So, also, where a ship being at the termination of one voyage, and about to proceed on another, money borrowed to pay the wages of seamen, who would not go on the second voyage without being paid, was considered necessary. *Robinson v. Lyall*, 7 Price, 592. But these instances do not apply where the owner of the vessel is living so near the spot as to be conveniently communicated with. In that case before the master has any right to make the owner a debtor to a third person he must consult him, and see whether he is willing to be made a debtor, or whether he will refuse to pay the money."

In the case of *The Karnak*, L. R. 2 Ad. & Ec. 239, 309, Sir Robert Phillimore, in referring to his decision in *The Lizzie*, L. R. 2 Ad. & Ec. 254, says: "In the recent case of *The Lizzie* I stated at length my view of the law which has been laid down with respect to the duty of the master to communicate with the owner of the cargo before he hypothecates it. That duty arises from the peculiar character of his relation as agent for the shipper, a relation forced upon him for the nonce by a temporary necessity, and therefore different from his original and abiding relation as agent for the owner of the ship. It must be observed, however, that the law does

not say that the necessity of communicating with the owner of the cargo is different in kind from the necessity of communicating with the owner of the ship; but there must be a separate communication, if in the circumstances it be feasible, with both. Referring to my judgment in *The Lizzie*, it is only necessary to state here that it is, generally speaking, the duty of the master to communicate with the owner of the cargo. The law looks with jealousy upon the exercise of authority by the master over the cargo." Lord Stowell, speaking of the master's authority with respect to the cargo (*The Gratitude*, 3 C. Rob. at p. 261), observes: "It is the same consideration which founds the rule of law that applies to the hypothecation of a ship. In all cases it is the prospect of benefit to the proprietor that is the foundation of the authority of the master. It is therefore true that if the repairs of the ship produce no benefit or prospect of benefit to the cargo, the master cannot bind the cargo for such repairs; but it appears to me that the fallacy of the argument that the master cannot bind the cargo for the repairs of the ship lies in supposing that whatever is done for the repairs of the ship is in no degree and under no circumstances done for the benefit, or with a prospect of a benefit, to the cargo; whereas the fact is that, though the prospect of benefit may be more direct and more immediate to the ship, it may still be for the preservation and conveyance of the cargo, and is justly considered as done for the common benefit of both ship and cargo." See *The Hebe*, 2 W. Rob. 146; *The Prince George*, 4 Moo. P. C. 21; *The North Star*, Lush. 45; *The Edmond*, Lush. 57; *The Hersey*, 3 Moo. P. C. 79; *The Ariadne*, 1 W. Rob. 411; *The Osmanli*, 3 W. Rob. 198; *Beldon v. Campbell*, 6 Ex. 86; *The Gosfabrick*, Swab. 344; *The Aurora*, 1 Wheat. 96; *The Laurel*, Br. & Lush. 191; *The Alexander*, 1 Dod. 278; *The Vibilia*, 1 W. Rob. 1; *The Prince George*, 4 Moo. P. C. 21; *Robinson v. Lyall*, 7 Price, 592; *The Augusta*, 1 Dod. 283; *The Zodiac*, 1 Hagg. 320; *The Lochiel*, 2 W. Rob. 34.

master, communicate with either of these. The first mortgagee contested the validity of the bond. It was held that the bond was invalid, for that, under the particular circumstances of the case, B. ought to have communicated with the owner before authorizing his agents to enter into the bond.¹ In this case, it was found that all the charges were quite proper; that the bottomry premium was not excessive; that there were none of the items which could have been stricken out; and that the recourse to a bottomry bond appeared to have been a matter of necessity; but, although the owner was insolvent, as he might have thought it expedient, had he been communicated with before the bond was entered into, to have endeavored to raise money, either through his creditors, or from the first mortgagee, or from some other source; in absence of such communication, the bond was pronounced invalid.

The same doctrine was held in *The Onward*.² There an American vessel laden with a cargo of timber, in the prosecution of a voyage from Moulmein to Queenstown for orders, sustained damage, and was compelled to put into the Mauritius to repair and refit. She arrived there on June 11, 1870, and her master, being without funds, placed the ship in the hands of H. & Co., a firm at the Mauritius, and they, before any attempt had been made to obtain money on the personal credit of the owners of the ship, who were affluent merchants in New York, proposed to advance money for the repairs on the master's draft on London, on his giving a bottomry bond on the ship, freight, and cargo, as collateral security. The master and H. & Co., on July 19, wrote to the owners of the ship, informing them of this proposal, and on the same day, the master and H. & Co. wrote to the owners of the cargo, informing them that the vessel had sustained damage, and would have to undergo repair; but the letters to the owners of the cargo omitted all reference to the proposed loan on bottomry, and informed the owners of the cargo that they should hear further particulars by the next opportunity. The letters written by the master and H. & Co. to the owners of the ship were forwarded by the owners of the ship to the owners of the cargo; but the owners of the cargo did not receive these letters till Sept. 8, when it was too late for them to communicate with the master by post. On Oct. 13, after the repairs had been completed, the master gave bills and executed a bottomry bond on the ship, freight, and cargo, according to the terms of the proposal made by H. & Co., which had long

¹ *The Panama*, L. R. 2 Ad. & Ec. 390.

² L. R. 4 Ad. & Ec. 38.

before been assented to by the master. The bills were made payable to H. & Co., and were drawn on B. & Co., H. & Co.'s agents in London, at ninety days' sight. H. & Co. gave the master a memorandum, stating that the bills were taken as collateral security, and that the bond should be cancelled on the prompt payment by the owners of the vessel to B. & Co., of the amount of the bills. On Oct. 15, the ship sailed from the Mauritius, and safely arrived at Liverpool, her port of discharge, on Feb. 7, 1871. After the ship had sailed, the owners of the cargo were for the first time informed by letter from H. & Co., that the bottomry bond had been given. The bond was transferred, and the bills of exchange were indorsed to B. & Co. Neither the master nor the owners of the vessel had any funds in the hands of B. & Co., and they neglected to provide funds to take up the bills, and informed B. & Co. that they had determined not to take up the bond.

Proceedings in admiralty were instituted by B. & Co. against the ship, her freight, and cargo. No appearance was entered on behalf of the owners of the ship and freight, and the judge pronounced for the validity of the bond as against the ship and freight, and condemned the ship and freight in the amount due in the bond. The proceeds of these not being sufficient to satisfy the bond, the plaintiffs carried on the suit against the cargo. The owners of the cargo appeared and defended the suit. The principal question raised in the suit was whether the bond was invalid so far as related to the cargo, for want of sufficient communication with the defendants. It was also claimed that the master should have transhipped the cargo at the Mauritius; and Sir Robert Phillimore held that it was competent for the defendant to set up the special defence that the master, being in the circumstances, and by the force of necessity, the agent for the cargo, should have transhipped the cargo rather than have contracted a loan on bottomry. But as it would have involved an amendment in the pleadings to have raised that question, it was not pressed. The court held that sufficient communication had not been had with the owners of the cargo, and the bond was declared invalid. In doing so, it was laid down as a doctrine at which the English courts have slowly but steadily arrived, that, according to the law, the master is always the agent for the ship, and in special cases of necessity the agent for the cargo also. He is the appointed agent to the former; the involuntary agent of the latter. That, flowing from these principles of jurisprudence, the consequence flows, that when the circumstances permit, the master must communicate with the owner before he does any acts which seriously affect

the value of the ship in the one case, or of the cargo in the other.¹

The Australian Steam Navigation Co. v. Morse,² is another case which decides that the authority of a master of a ship to sell the goods of an absent owner, is derived from the necessity of the situation in which he is placed; and consequently, to justify his selling, he must establish a necessity for the sale, and inability to communicate with the owner. Under these conditions, and by force of them, the master becomes the agent of the owner, not only with the power, but under the obligation, within certain limits, of acting for the owner; but he is not in any case entitled to substitute his own judgment for the will of the owner, in selling the goods, where it is possible to communicate with the owner. The possibility of communicating with the owner depends on the circumstances of each case, involving the consideration of the facts which create the urgency for an early sale, — the distance of the port from the owner, the means of communication which may exist, and the general position of the master in the particular emergency. Such a communication need only be made when an answer can be obtained, or there is a reasonable expectation that it can be obtained, before the sale. Where, however, there is ground for such an expectation, every endeavor, so far as the position in which he is placed will allow, should be made by the master to obtain the owner's instructions.³

¹ The Onward, L. R. 4 Ad. & Ec. at p. 51. On the question of communication see *The Buonaparte*, 3 W. Rob. 298; 8 Moo. P. C. 459; *Glascott v. Lang*, 2 Phillips, 310; *The Cargo ex Sultan*, Swab. 504; *The Hamburg, Bro. & Lush*, 253, 273; *The Lizzie*, L. R. 2 Ad. & Ec. 254, 259; *The Panama*, L. R. 3 P. C. 199; *The Karnak*, L. R. 2 Ad. & Ec. 289; L. R. 2 P. C. 505; *The Lord Cochrane*, 2 W. Rob. 320; *Duncan v. Benson*, 3 Ex. 644; *The Gratitude*, 3 C. Rob. 240.

² L. R. 4 P. C. 222.

³ *Ibid.* The cases in this country are very generally to the same effect as those cited by us in the above notes.

We examine some of the numerous cases which have been decided in the State and Federal courts of this country. A ship by stress of weather had been driven out of her course. The court held that, the charge of the cargo devolving upon the master, it was his duty to take proper care of it. In such case the master has power to sell goods which are damaged or of a perishable nature. But those which are in good condition and not perishable he has no right to sell without the order of the owners, to whom he is bound to give immediate information. If he sell with-

out justification he makes himself personally liable. *Smith v. Martin*, 6 Binn. 262. In *Butler v. Murray*, 30 N. Y. 88, it was held that the master of a vessel is for most purposes the agent of the owners of the ship and cargo; but that agency does not extend to a sale of either unless there is a necessity at the time for so doing; and this, citing Lord Ellenborough, Abbott, C. J., and Bayley and Park, J.J., "must be an *apparent* necessity;" "a case of *absolute* necessity;" "a case of *inevitable* necessity;" or, as was held in *Bryant v. Commonwealth Ins. Co.*, 13 Pick. 543, 551, "a *necessity* or, as it is sometimes expressed, a *legal necessity*, before the master can sell." The court held that in order to justify the sale of a cargo at an intermediate port several things must concur. (1) There must be a necessity for it arising either from the nature or condition of the property, or from the inability to complete the voyage by the same ship or to procure another. (2) The captain must have acted in good faith. (3) He must, if practicable, consult with the owners before selling. *Butler v. Murray*, 30 N. Y. 88; *The New, Eng. Ins. Co. v. Brig Sarah*, 13 Peters, 387.

Parker, C. J., in an old Massachusetts

The principle is well established by numerous cases, that the master of a ship being an agent of necessity, his agency is limited

case, *Gordon v. Mass. Fire & Mar. Ins. Co.*, 2 Pick. 249, 261, says: "It is certain that the master of a vessel as such has no authority to sell the vessel or the cargo unless in a case of *extreme necessity*, and where he acts with the most perfect good faith for the interest of those who are concerned in the property. The very ground upon which the authority rests, namely, *extreme necessity*, is pregnant with uncertainty, as the facts which create it will vary in their effect upon minds differently constituted. . . . I think we may take it to be established law that the master of a vessel insured, which has received damage by the perils of the sea, may in cases of necessity sell the vessel, and that upon a sale so occasioned may be founded a claim against the underwriters for a total loss; whether with or without abandonment is another question for consideration. Whether such necessity existed or not must be always a question of fact for the jury. This necessity must be of a moral nature, resulting from certain facts and circumstances, which are to be judged of first by the master himself, and afterwards rejudged by a jury, and perhaps, with some strictness, on account of the danger there may be of an abuse of this authority by collusion between the master and the owners to the prejudice of the underwriters, or by the fraud of the master alone to answer some private purpose of his own, or to defraud the owners (See *Somes v. Sugrue*, 4 C. & P. 276; *Patapsco Ins. Co. v. Southgate*, 5 Pet. 621). But the jury will judge of the conduct of the master from the state of things at the time and place when and where the sale took place; from the conduct of the master in the measures preliminary to the sale, and from the actual circumstances attending it. If the vessel has met with any considerable sea damage, the usual course is to obtain the opinion of competent persons as to the degree of injury, the means of repairing it, and the fitness or unfitness of encountering the expense which may have been necessary. These opinions, founded on facts which are known to the persons composing the board from actual observation, and from personal examination of the vessel, though not conclusive, are certainly very strong evidence of the condition of the vessel, and of the propriety of repairing her or breaking her up as unfit for repair." And see *Smith v. Robertson*, 2 Dow, 479; *Milles v. Fletcher*, 1 Doug. 234; *Green v. Royal Ex. Ass. Co.*, 6 Taunt. 68; *Idle v. Royal Ex. Ass. Co.*, 8 Taunt. 755; *Hayman v.*

Molton, 5 Esp. 65; *Thornely v. Hebson*, 2 B. & Ald. 518; *The Gratitude*, 3 Rob. Ad. 240; *The Betty Cathcart*, 1 Rob. Ad. 220; *Hall v. Franklin Ins. Co.*, 9 Pick. 477; *Winn v. Columbian Ins. Co.*, 12 Pick. 282; *Bryant v. Commonwealth Ins. Co.*, 6 Pick. 131; *Carman v. Meaburn*, 1 Bing. 243; *Freeman v. East India Co.*, 5 B. & Ald. 617; *Fanny and Elmira*, Edw. Ad. 117; *The Schr. Tilton*, 5 Mason, 475; *American Ins. Co. v. Center*, 4 Wend. 52. See the distinction as to a sale by a master as to the owners, and a sale by a master to bind the insurers, *Idle v. Royal Ex. Ass. Co.*, 8 Taunt. 755; *The Schr. Tilton*, 5 Mason, 475; *American Ins. Co. v. Center*, 4 Wend. 52.

It is the well-known rule on the subject, that to warrant a sale, it must be made to appear to the satisfaction of the jury, not only that there is an actually existing, inevitable necessity for breaking up the voyage and abandoning the ship, but that in determining upon that measure the master acted with competent skill and judgment; with due care, diligence, and attention, and with strict fidelity. In testing the conduct of the master in these particulars, it is not an unfit illustration to inquire how a prudent and discreet owner, interested to the amount of the property, would act under like circumstances. It furnishes, at least, a test of the honesty and sincerity, the zeal and perseverance with which he acts, for the benefit of those concerned in the preservation of the property under his charge. *Winn v. Columbian Ins. Co.* 12 Pick. 279, 286; *The Patapsco Ins. Co. v. Southgate*, 5 Pet. 604; *Robinson v. Commonwealth Ins. Co.*, 3 Sumn. 227. It was held in *Pike v. Balch*, 38 Me. 302, that if the voyage be broken up, in the course of it, by ungovernable circumstances, the master, in that case, may even sell the ship or cargo, provided it be done in good faith for the good of all concerned, and in cases of supreme necessity which sweeps all ordinary rules before it. In case of necessity or calamity, during the voyage, the master becomes the agent of the owners and insurers of the ship and cargo. He is bound to act in good faith, and for the benefit of all concerned, and is not justified in selling either ship or cargo but in case of extreme necessity. *N. E. Ins. Co. v. Brig Sarah Ann*, 13 Pet. 387.

A sale is the last thing the master should think of, because it can only be justified by that necessity which supercedes all human laws. The merchant should be consulted if possible, and, undoubtedly, as a general rule, the earliest

by the necessity; and therefore that he cannot, as a general rule, bind the shipowner even for "necessaries" at the home port;

use of the ordinary means to convey intelligence in such cases would be the most available and effectual means in the power of the master; but where the calamity occurs in a place so situated and limited in its ordinary means of transmitting intelligence by mail, that a resort thereto would be obviously fruitless and nugatory, it is not going beyond the requirements of well-established law to hold the master bound to avail himself of such other means as may be in his power, and by which notice might be speedily communicated to the owners. *Pike v. Balch*, 38 Me. 302; *N. E. Ins. Co. v. Brig Sarah Ann*, 13 Pet. 387; *Hall v. Franklin Ins. Co.*, 9 Pick. 466; *Bryant v. Commonwealth Ins. Co.* 13 Pick. 543; *Peirce v. Ocean Ins. Co.*, 13 Pick. 543.

In *Wainwright v. Crawford*, 4 Dallas, 225, which was an action to recover from the owner money lent to the master for repairs and disbursements, the court held that if the jury were satisfied that there was an actual necessity for borrowing the money, the plaintiffs should recover; that the lender was bound to make due inquiry whether the repairs were necessary, and whether the master had effects in his hands sufficient to defray the expense of repairing, without resorting to a loan. But if the case of necessity existed, and the plaintiffs did not know that the master had sufficient funds in possession to relieve the necessity, the owner would be bound personally. See *Rich v. Coe*, 2 Cowp. 636; *Samsun v. Bragginton*, 1 Ves. Sen. 443; *Yates v. Hall*, 1 T. R. 73; *Sherman v. Degrave*, 2 Vern. 643; 14 Vin. Ab. 300, pl. 9.

In *Pope v. Nickerson*, 3 Story, 465, 477, it is laid down as an established principle, as old almost as the navigation of these countries, that the authority of the master, as to the employment of the ship, or the repairing of the ship, or the supplying of the ship with provisions or other necessities, abroad as well as at home, is limited by the express or implied authority derivable from the laws of the country, or the usage of the trade, or the business of the ship, or the instructions of the owner; and he cannot bind the ship or the owners beyond these limits. In this case it was held that the shipowners were liable personally to the plaintiffs, the cargo-owners, for the proceeds of the cargo appropriated by the master of the ship, for repairs to the ship; that the sale of perishing articles, and the appropriation of the proceeds to the repairs of the ship, were justifiable. But that the sale of the

sound part of the cargo was unjustifiable, and that the shipowners were not liable for this, nor for moneys paid out of such proceeds by the master in payment of a bottomry bond; but that the master was responsible to the shippers for the proceeds of such sale. In *Myers v. Baymore*, 10 Pa. St. 114, the shipmaster sold at a port of refuge sugar which the surveyors reported was damaged by sea water, and the sale of which they recommended. The proceeds were used for the repairs of the vessel. The shipowners were held liable for the market value of the sugar at the port of destination. In cases of necessity or calamity, during the voyage, the master is by law created agent for the benefit of all concerned; and his acts, done under such circumstances, in the exercise of a sound discretion, are binding upon all the parties in interest in the voyage. And where a cargo is so much injured that it will endanger the safety of the ship and cargo, or it will become utterly worthless, it is the duty of the master to land and sell the cargo at the place where the necessity arises, even although it might have been carried to the port of destination, and there landed. *Jordan v. Warren Ins. Co.*, 1 Story, 342.

In *Bryant v. Commonwealth Ins. Co.*, 6 Pick. 131, 141, it is laid down that the law authorizes the master, in cases of shipwreck, stranding, or other disasters which may happen without his fault, in the course of the voyage, to act for all parties interested, in their absence. If the ship should be stranded, it would be his duty, in behalf of the owner of the ship, to get her off and prosecute the voyage, if it could be done at an expense not exceeding half her value. So, if that could not be done, he has authority to procure another ship to carry the cargo to the port of destination. If the cargo were damaged by the stranding not exceeding one-half the invoice value, it would be the duty of the master, as representing the owner of it, to cause it to be reloaded on board the ship, if that were in a condition to transport it; or if not, on board any other ship which he could procure upon reasonable terms, on account of the shipowner, to the end that the shipowner may earn his freight, and the merchant have his goods at the port of destination. See *Hunt v. Royal Ex. Ass. Co.*, 5 Mau. & S. 47. The master, in short, is, in such cases of disaster, to act reasonably and honestly, with a view to save the property and to perform the voyage. *Schieffelin v. N. Y. Ins. Co.*, 9 Johns. 21; *Wilson v. The Royal*

for, in such case, goods supplied to the captain's order would not be necessities in one sense, because the owner would have supplied them.¹

Ex. Ass. Co. 2 Campb. 623 ; Manning v. Newnham, 2 Campb. 624 n.

The principles of the maritime law clothe the master with the power of agent of the cargo when cases of extremity occur. He may sell a part, or he may hypothecate the whole cargo even, for the necessary repairs of the ship, when that act is required to enable him to continue the voyage. Though, ordinarily, he is the mere carrier of the cargo, yet in a case of difficulty and peril, he becomes, *ex necessitate*, a trustee of it, with a large and liberal discretion, and this power is then given to him from public policy, for without this power the cargo might be left to perish. The Gratitude, 3 Rob. Ad. 240. And this power over the cargo for repairs to the ship exists in at least equal force where the interest of the cargo is directly in question ; but to mortgage the ship for the benefit of the cargo is going beyond his trust and the rules of law. Fontaine v. The Columbian Ins. Co., 9 Johns. 29.

Unless it appears that a sale of cargo is a necessity, the master has no authority to sell it, at an intermediate port. In order to justify such a sale it must appear that the cargo could not have been sent forward by the vessel in which it was shipped, or by some other vessel. Dodge v. The Union Mar. Ins. Co., 17 Mass. 471. In The William Carey, 3 Ware, 313, the sale of a ship by a master was sustained, but with considerable hesitancy. The necessity for the sale was considered clear ; but this alone is not sufficient. There must be entirely good faith in the sale on the part of the master. He is appointed to navigate the vessel, and for that purpose he is the agent of the owners, and has all the powers that such an agency requires ; but the agency to sell the ship is cast upon him by the law in extreme cases, and it is his duty to obtain as much for her, and for the benefit of the owners, as he can. Some doubtful conduct on the part of the master was unexplained, but the libel to set aside the sale was dismissed, with evident doubt ; but, on appeal, the judgment was affirmed, but *without costs* ; a further expression as to the necessity of thorough good faith on the part of the agent of necessity. The William Carey, 3 Ware, 313, 317.

The following cases further exemplify the principles governing sales of ship and cargo by the master under circumstances in which by law he is created the agent of

necessity of all parties interested : Peters v. Ballister, 3 Pick. 495 ; Milward v. Hallett, 2 Caines (N. Y.), 77 ; Wainwright v. Crawford, 3 Yeates (Pa.), 131 ; Merritt v. Walsh, 32 N. Y. 685 ; Fitz v. The Galliot Amelie, 2 Cliff. (Circ. Ct.) 440 ; The Patapasco Ins. Co. v. Southgate, 3 Pet. 620 ; N. E. Ins. Co. v. Sarah Ann, 13 Pet. 400 ; Post v. Jones, 19 How. 157 ; Prince v. Ocean Ins. Co., 40 Me. 493 ; Harned v. Churchman, 4 La. Ann. 310 ; Rugely v. Sun Mut. Ins. Co. of N. Y., 7 La. Ann. 279 ; The Ship Packet, 3 Mason, 255 ; The Eugene Vesta, 28 Fed. Rep. 762. Where the circumstances of the case do not disclose that urgent necessity which alone authorizes the sale of the vessel and cargo by the master, the sale is an act of barratry on his part which confers no title on the purchaser. Graham v. Underwood, 15 La. Ann. 402.

The authority of the master to bind the ship or owners being only for necessities, the party furnishing the supplies is required to give some proof that they are necessities.

In England, it has been held that the proof that the articles furnished were necessary should come from the party supplying them, to the extent of showing that they were what a reasonable and prudent owner would have ordered. that there must be sure evidence ; and that, as founded on great and important principles, and as wisely framed to prevent great abuses, the doctrine casts the *onus probandi* on the tradesman or material-man who provided the articles. The Alexander, 1 W. Rob. 361 ; The Sophie, *Id.* 369. And see Rocher v. Bushier, 1 Stark. 27 ; Palmer v. Gooch, 2 Stark. 428 ; Beldon v. Campbell, 6 Ex. 886.

In this country a different rule has been laid down, viz., that while the supplies are confined to such as are necessary, it leaves the decision as to what is necessary rather to the master than the creditor. Ford v. Crocker, 48 Barb. 142. In Provost v. Patchin, 9 N. Y. 235, it was held, that where labor by way of repairs is performed on a ship, or supplies furnished, the presumption is that it was done and furnished for the benefit and at the request of the owners. See Flanders v. Merritt, 3 Barb. 201. And where the master told the storekeeper that the supplies were needed for the vessel, the owners were held liable. Kenzel v. Kirk, 37 Barb. 113. But in The Medora, 1 Sprague,

¹ Per Brett, J., in Gunn v. Roberts, L. R. 9 C. P. 331 ; at p. 332.

This principle in *Gunn v. Roberts*¹ and in other cases has been still further applied. In *Gunn v. Roberts*, the defendants were

139, the necessity of the supplies is put upon the same ground as in *The Alexander*, 1 W. Rob. 361, — as necessary, if they are fit and proper for the service in which the vessel is engaged, and what the owner of that vessel, as a prudent man, would have ordered if present. In *Webb v. Pierce*, 1 Sprague, 192, 194, the general doctrine is laid down, which may be said to be universally true, that, among the usual and well-known powers of a master, is that of obtaining *necessary supplies* in a foreign port upon the credit of his vessel and owners. As his power is that of an agent to obtain only *necessary supplies*, it would seem, on principle, that he who claims against the ship or owner, on the contract of the master, would, in order to bind the ship or owner, have to show the necessity for the supplies. Precisely the same burden would seem to rest upon the furnisher of the supplies in this case as in the closely analogous case of that other agent of necessity, — a married woman abandoned by her husband. The difficulty in every case of the proof of the necessity is clearly no greater in the one case than in the other. Even under the old rules of evidence, excluding evidence from interest, now so generally changed, the testimony of the master was held admissible, as an exception to the general rule of evidence excluding interested witnesses, from necessity of public convenience. 1 Gr. on Ev., § 416; *Fuller v. Wheelock*, 10 Pick. 137; *The Nestor*, 1 Sumn. 73; *The Medora*, 1 Sprague, 138.

In *The Nestor*, 1 Sumn. 73, where the question of the admissibility of the master's evidence is considered at length, the burden of proof seems to have been placed on the seller to show that an admitted necessity — a cable, which was sold to the master — was sold on the credit of the ship. We find an old American case where this view is sustained, and is considered undoubted. It is there said: "That an owner is generally only responsible for necessities is not denied. In the case of *Carey v. White* (1 Bro. P. C. 284), this doctrine was fully considered and firmly established. It has not, I believe, been seriously questioned since. But what are necessities the jury only can decide, as was ruled in the case just cited. But it is contended the jury had not sufficient evidence before them to authorize the conclusion that the articles furnished were necessary. One witness declared that the articles furnished were generally necessary to vessels similarly

situated. The captain, who was the confidential servant of the owner, and the best judge of what was necessary, certifies, under his hand, this account. Another witness proves that large sums were paid and advanced to the seamen. A large item in the account is for the duty; another is the carpenter's bill, etc. This was evidence enough to go to the jury." All of this evidence was on the part of the plaintiff, and the accounts showed the application of the sums advanced to the necessary purposes of the ship. It was held that this evidence authorized the jury to find in favor of the plaintiffs. *Burquin v. Flinn*, 1 McCord, 316.

The case above cited as *Carey v. White*, 1 Bro. P. C. 284, and which is cited in *Abbott on Ship*. (12th London ed.), 94, as there reported, we find reported as *Carey v. White*, 5 Bro. P. C. 325 (2d ed., by Tomlins, A. D. 1803). It was there held that in a voyage the master of a ship is the owner's servant, and his duty requires him to provide *necessaries* for the ship, and it is the owner's interest that they should be provided; therefore what the master *necessarily* takes up, and employs for that purpose, the owners must pay. This clearly places the burden of proof, where we think it unquestionably rests, on the party supplying the money or materials. There was an issue ordered in this case to try whether any, and what sums of money, were *necessarily* laid out by, or by the order of, the appellant for the payment of seamen's wages, provisions, or otherwise, *for the necessary repairs and use of the ship*. The affirmative of the issue would here lie on the plaintiff, to show what was *necessarily* laid out *for the necessary repairs and use of the ship*; and on such an issue the shipowner would not be called on, in the first instance, to prove the negative, — that the money was not *necessarily* laid out, etc. See s. c. 15 Vin. Ab. 348; 2 Eq. Cas. Ab. 722.

In a case before very able judges (Lord Brougham, Baron Parke, Bosanquet, J., and Dr. Lushington), the rule was laid down thus: "The foreign merchant ought to know that the master's authority to bind the ship and cargo by a bottomry bond is *founded on necessity alone*; and that it is his duty, before he takes a security so onerously affecting the property of others, to satisfy himself, by a reasonable inquiry, that the *circumstances of the case justify the master in this exercise of his authority*." *Soares v. Rahn*, 3 Moo.

¹ L. R. 9 C. P. 331.

owners of the ship *Aracana*. The action was brought for money and supplies furnished by the plaintiff, on the master's order, for

P. C. 1. In this case the ship was in the port of Lisbon, bound, with a cargo of quicksilver, from the port of Cadiz to London, and needing repairs; and it was advertised that a public sale would take place of a loan on bottomry, "to defray the expenses occasioned by the vessel having been forced to put into the port of Lisbon." It seemed that the master could have got the money for the necessary repairs of the ship on the personal credit of the owner; but it did not appear that the plaintiff, who bought the bond at the auction, was aware of this fact. The Privy Council, affirming the judgment of the Court of Admiralty, held that the plaintiff could not recover. See *The Augusta*, 1 Dod. 283; *The Orelia*, 3 Hagg. 75; *Heathorn v. Darling*, 1 Moo. P. C. 5; *Gore v. Gardner*, 1 Moo. P. C. 76; *Stainbank v. Fenning*, 11 C. B. 88; *The Rhadamanthe*, 1 Dod. 201; *The Alexander*, 1 Dod. 278.

The case of *Soares v. Rahn*, 3 Moo. P. C. 1, was, as will be observed, the case of a sale of bottomry bond. We think that, in such a case, as well as in that of a sale by the master of the ship or cargo or both, as the agency is created *ex necessitate*, and is within the strictest rules of special agency, in connection with extraordinary duties that are thrust upon him, the rule as to showing the necessity for the master's acts would, on principle, be much more rigorously applied than in the ordinary case of a master purchasing usual necessary supplies for the ordinary requirements of the vessel. In this latter case the master would occupy more nearly, for the purpose of obtaining such necessary supplies, the position of a general agent,—limited, of course, by the scope of his employment. See *Morton v. Day*, 6 La. Ann. 762; *General Interest Ins. Co. v. Ruggles*, 12 Wheat. 412; *Peters v. Ballesher*, 3 Pick. 495; *Pope v. Nickerson*, 3 Story, 465; *The Grapeshot*, 9 Wall. 136; *Miller v. Palmer*, 58 Md. 451; *Party v. Clark*, 41 Md. 327. This distinction may tend to harmonize some of the cases which otherwise seem irreconcilable.

With reference to the general agency for such purpose, a very high authority on the subject says: "The master is the presumed and accredited agent in fitting out, victualling, and manning the ship abroad; and that for his engagements in those respects, or even for money borrowed for the purpose of furnishing necessities for the ship, the owners will be bound, provided the loan appears to be fairly supported by evidence of existing necessities."

1 Bell's Com. (7th ed.), 556. We think this a fair statement of the law, and that, even in the case where the master is the agent of the owners to obtain ordinary necessary supplies, the burden of proof of showing the existing necessity is on the party supplying them, which, we think, would be met by fairly showing that they were necessities furnished the master, in good faith, for the ship. See an elaborate judgment by Story, J., in *The Ship Fortitude*, 3 Sumn. 228, 249, in which, on the point, he says: "The point can only arise where no necessity for the repairs or supplies exists, and where, by the use of reasonable diligence, the absence of such necessity could have been known and ascertained. If the repairs and supplies are necessary, then the creditor will be entitled to recover the amount from the owner (for I am speaking of cases of ordinary supplies, where no bottomry bond is taken), without making any inquiry whatever. On the other hand, if no inquiries whatever could have put the creditor in possession of the real facts, and he has acted upon the representations of the master with good faith, and under circumstances affording no ground of suspicion of ill faith in the master, I conceive that he is dispensed from all responsibility in regard to such inquiries. Thus if he should be deceived in making advances for repairs, or supplies for imaginary injuries or losses at sea, which he could have no means of knowing or tracing, but which the master and crew fraudulently pretended to exist [such, we would instance, as the pretended loss of his boats at sea, when they had been fraudulently parted with], I presume that he would be enabled to recover against the owners for reasonable advances made by him to repair such injuries or supply such losses. But where the creditor could, by due diligence, ascertain the necessity of the repairs or supplies, then, under such circumstances, if he makes no inquiries, and no such necessity in fact exists, he will have no claim upon the owner." But all this is consistent with the principle that the burden of proof is on the plaintiff to show affirmatively that he supplied necessities to the master for the ship, as the burden of proof is on the purchaser of the ship or cargo to show the necessity for the sale.

In a note to 1 Bell's Com., 556, we find the case of *Carey v. White*, 5 Bro. P. C. 325, referred to, in which it is stated that in two several trials (one at bar) on the issue ordered, verdicts were given that nothing was necessarily laid out, and so Carey's suit was dismissed.

the necessary purposes of the ship while she was at Quebec, to which port she had gone in search of a cargo. The ship was consigned to R. & Co., at Quebec, and the defendants supplied them with funds, and authorized and instructed them, as their agents, to advance any further sums for the purpose of supplying the necessities of the ship for her voyage. The defendants had forbidden the captain from applying or pledging their credit to any other persons than R. & Co., in respect of the ship's necessities. The plaintiff was ignorant of this, and of the fact that R. & Co. were the defendants' agents; but the jury found that he might, by making ordinary inquiry, have ascertained the fact that R. & Co. were the defendant's agents for the purposes of the ship. R. & Co. were ready and willing and able to advance any sums which might have been necessary for the purposes of the ship. The verdict was entered for the plaintiff, with leave reserved for motion to enter it for defendants. On rule granted, Benjamin, Q. C., on showing cause, claimed that the master, as general agent for the purposes of the ship, had power at a foreign port to pledge the owner's credit for necessities; and that the fact of the owner having an agent at the foreign port to furnish the necessities, would not affect the right of any one else furnishing necessities to the master to recover therefor from the owner. The court (Brett and Denman, JJ.) held the reverse.¹

¹ The case was put by Denman, J., as one of first instance. He says: "In all the statements of the law of the subject, it seems always to be assumed that it is well settled that the captain has no authority to pledge the owner's credit when he has an authorized agent in the port. Though there is no actual case deciding the point, all the cases seem to corroborate this view." At p. 338. The contention of the counsel for the plaintiff was thus disposed of by Brett, J.: "It was said that the captain is the general agent of the owners. That proposition cannot be supported in the fullest sense of the terms in which it was stated. The captain has authority to bind the owners to pay for supplies or repay money advanced, only when the necessity of the case gives him that authority. In order to give rise to that authority it has for many years been recognized that two things are necessary; first, it must appear that the money borrowed or goods supplied were necessary for the use of the ship, not absolutely necessary, but reasonably necessary according to the ordinary course of prudent conduct, in the opinion of the jury; 2dly, it is not sufficient that the moneys lent, or goods supplied, were necessary for the

ship's use, but it must be shown, also, that it was reasonably necessary that the captain should obtain or order them on the owner's credit. If the captain be in a foreign port, and the owner is not there, and there is no agent of his there, and the captain has not been himself put in funds by the owner, then it may be reasonably necessary that he should order supplies on the owner's credit for the necessary purposes of the ship, as in the case of *Edwards v. Havell*, 14 C. B. 107; 23 L. J. C. P. 8; but if he is either in a port in the owner's country, or a foreign port, and the owner is there with means to pay for goods, or credit to order them for himself, the owner is the master of affairs, and there is no necessity for the captain to order them or to pledge the owner's credit; and so there is no necessity for the captain's making a contract to bind the owner. Accordingly, if it be found that the owner is present at the port, and has the means or credit to obtain supplies, I think it is the law of England that the judge should direct the jury that there is no necessity for any authority on the part of the captain, and the jury would not be justified in finding that there was any such necessity. The same principle ap-

Where a master sold a vessel under circumstances which, it was admitted, did not authorize the sale, it was sought by the

plies even when the owner is not present, if he has either in a port in his own or a foreign country constituted an agent to stand in his place, and intrusted such agent with his discretion to act in the management of the ship, and such agent has undertaken and has the necessary means or credit to do so. In such case the agent represents the owner, and the captain as servant of the owner is bound to act under his directions, and has no authority to act for himself in the matter." For further cases applicable to the point involved, see *Arthur v. Barton*, 6 M. & W. 138; *Grant v. Norway*, 10 C. B. 665; *The Faithful*, 31 L. J. (P. M. & A.) 81; *Johns v. Symons*, 2 Q. B. 425; *The Alexander*, 1 W. Rob. 346; *Brayshaw v. Eaton*, 14 C. B. 107; *Edwards v. Havell*, 14 C. B. 107; *Mackintosh v. Mitcheson*, 4 Ex. 175; *Williamson v. Page*, 1 C. & K. 581; *Felster v. Leekamp*, 4 B. & Ald. 352; *The Riga*, L. R. 3 Ad. & Ec. 516; *Macready v. Thorn*, 51 N. Y. Ap. Cas. 454; *Robinson v. Lyall*, 7 Price, 592; *Rocher v. Busher*, 2 Stark. 27; *Palmer v. Gooch*, 2 Stark. 428; *Evans v. Williams*, 7 T. R. 481 n.; *Milward v. Hallett*, 2 Caines, 77; *The United Ins. Co. v. Scott*, 1 Johns. 106, 111; *Reade v. Commercial Ins. Co.*, 3 Johns. 352; *Ward v. Green*, 6 Cow. 173; *Wainwright v. Crawford*, 3 Yeates, 131; *Ross v. The Active*, 2 Wash. 226, 236.

In *The General Smith*, 4 Wheat. 438, the law is thus laid down as to a lien on a ship for necessities furnished: "Where repairs have been made, or necessities have been furnished to a foreign ship, or to a ship in a port of the State to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security; and he may well maintain a suit *in rem* in the admiralty to enforce his right. But in respect to repairs and necessities in the port or State to which the ship belongs, the case is governed altogether by the municipal law of that State; and no lien is implied, unless it is recognized by that law. Now it has been long settled, whether originally upon the soundest principles it is now too late to inquire, that, by the common law, material-men and mechanics furnishing repairs to a domestic ship, have no particular lien upon the ship itself for the recovery of their demands. A shipwright, indeed, who has taken a ship into his possession to repair it, is not bound to part with the possession until he is paid for the repairs, any more than any other artificer. But if he has once parted with the possession, or has worked upon it with-

out taking possession, he is not deemed a privileged creditor, having any claim upon the ship itself."

We state the principles of some of the numerous cases decided in the American courts on questions relating to the authority of the shipmaster to bind the ship and cargo, the owners, and others concerned, at the home port, and at foreign ports, respectively.

The case of *Stearns v. Doe*, 78 Mass. 482, was a case where a vessel was owned in New York, and money was advanced to the master in Boston to pay off the officers and crew, there being no consignee or agent of the owners there, and the States in this country, with respect to the application of the law in the matter, being treated as foreign to each other. The court held, in accordance with the English decisions, that the authority of a master to borrow money in a foreign port, on the credit of the owner, in his absence and where there is no agent or consignee of the vessel, is clear and unquestionable. The limitation on this authority is equally clear. The money must be necessary for the vessel; that is, it must be required for purposes which a prudent person would deem to be reasonably fit and proper under the circumstances in which the vessel is placed. But it is not correct that a master can in no case borrow on the credit of the owner to pay an existing liability, or a debt already incurred. There may be such a limitation on his authority where repairs have been done or supplies furnished on the personal credit of the owner, and without any stipulation for payment in ready money. *Beldon v. Campbell*, 6 Ex. 886. But no such restriction in the power of the master exists where a debt has been duly contracted, which constitutes a lien on the vessel or cargo, capable of immediate enforcement in a foreign port. On the contrary, in such cases the master would have power to give a pledge of the vessel by way of bottomry, and *a fortiori* to pledge the personal credit of the owner of the vessel. *The Alexander*, 1 Dod. 280; *The Vitulia*, 1 W. Rob. 1.

The questions whether the money is necessary under the circumstances in which the vessel is situated at the time of the loan, and whether the master's position is such as to constitute him the authorized agent of the owner to borrow money, are for the consideration of the jury. *Johns v. Simons*, 2 A. & E. N. S. 425; *Arthur v. Barton*, 6 M. & W. 138.

A vessel left New Orleans for Tampico, Mexico, and when within about six miles of her destination grounded on a bar.

purchasers to sustain their title on the ground that the owners, the libellants, by their abandonment of the vessel to the under-

She was lightened and got off with slight damage. The communication between Tampico and New Orleans was constant and easy. The master, without waiting for any instructions from the owners or underwriters, had a survey held, the surveyors advising a sale. The vessel was valued at \$10,000, and was insured for that amount. She realized \$3200; one-half of which was paid by the master to salvors, who had expended in their work about \$250. The master, without waiting for authority, had submitted the claim to arbitration. The purchaser put in a temporary rudder at the expense of about \$100, and, the vessel being perfectly tight, sailed her to New Orleans, and had her thoroughly repaired there at a cost of about \$800. The owners claimed for a total loss, and tendered an abandonment, which was rejected. The plaintiffs having brought an action, on judgment of nonsuit against them, appealed, claiming that they were entitled to recover for a total loss, in consequence of the vessel having passed from them by a necessary and justifiable sale. The court held that it was not the mere fact of a sale by the master which entitles an assured to abandon; but the ship's being reduced to such a state as to justify the sale. And, further, that the master's submission of the question of salvage to arbitration was without authority (see *Housemain v. Schr.* North Carolina, 15 Pet. 45); that the advice of the surveyors or their opinion was not conclusive (see *Gordon v. Mass. Fire & M. Ins. Co.*, 2 Pick. 344); that the master should have brought the vessel to New Orleans for repairs (see *Hall v. Franklin*, 9 Pick. 467); and that, as there was nothing in the distance from the scene of disaster, or in the pressing imminence of the danger, to prevent the master from communicating with the owners or underwriters, the sale was unnecessary and unjustifiable; and the judgment was affirmed. *Peck v. Nashville Mar. & Fire Ins. Co.*, 6 La. Ann. 148.

In general, the master has no authority to sell the ship. There is, however, an exception to this rule, when she meets with a disaster which renders it necessary to sell her, in order to save a part of her value, rather than to run the risk of a total loss. The master's right to act in such an emergency arises from the necessity of acting before the owners can be consulted. He acts for them, because they have no opportunity to act for themselves. If they are present, his authority to sell ceases. He is bound to exercise the same

discretion that an uninsured owner or agent of the underwriters would exercise if present. Hence it is his duty to notify the parties interested of the disaster, when it can seasonably be done, that they may send him instructions, or be present to judge of the situation for themselves. When their discretion may be called into exercise, there is no occasion for the master to exercise his; there is no necessity for him to sell, when they may judge of the necessity for a sale themselves. The chance of recovering the vessel is worth as much to the owners as it is to the purchasers. They have a right to the benefit of the choice of the alternatives of risking or selling her, when there is an opportunity for the master to give them seasonable notice of the disaster; and he cannot divest them of this right. Nor is it necessary that the master should fraudulently neglect to give such notice, to invalidate the sale. It is the master's duty to use the earliest means, ordinarily available, to convey intelligence of the disaster to his owners, when they may thus be reached in season to act before the sale; and if he neglects to do this, either from indifference, carelessness, or ignorance of duty, the sale will be void as to such owners. *Gates v. Thompson*, 57 Me. 442; *New England Ins. Co. v. The Sarah Ann*, 13 Pet. 387; *American Ins. Co. v. Center*, 4 Wend. 55; *Hall v. Franklin Ins. Co.*, 9 Pick. 466; *Bryant v. Commonwealth Ins. Co.*, 13 Pick. 543; *Pierce v. Ocean Ins. Co.*, 18 Pick. 83; *Stephenson v. Piscataquis Ins. Co.*, 54 Me. 55.

And part-owners of a vessel are not co-partners, but tenants in common. Notice to one part-owner is not notice to another, nor has one part-owner any right to sell, or authorize a consent to the sale of the interest of his associate part-owner. The duty of the master to give the notice in question extends to all the part-owners within his means of intercommunication. And if the master sell the whole, when he has authority to sell only a part, the sale will be valid as to that part, and void as to the rest. *Gates v. Thompson*, 57 Me. 442, 445, *et seq.*; *Pierce v. Ocean Ins. Co.*, 18 Pick. 83.

It was held in *Pentz v. Clark*, 41 Md. 327, that the question as to the authority of the master to pledge the credit of the owner for necessary supplies and repairs rests upon and must be determined by the general principles which govern the law of agency. To a certain extent at least the master is and must necessarily be treated as the agent of the owner, and as such

writers, affirmed, by way of ratification or estoppel, the title of the claimant. The court held that nothing but extreme necessity

clothed with authority to do whatever may be considered fairly to be within the scope of his appointment. He must, of course, have the power to do whatever may be *necessary* to enable him to prosecute the voyage. If he should be in a foreign port, and repairs are necessary to be done, and the owner is not there, and has no agent there authorized to act for him, the master must from the necessity of his position be considered as having the authority to order such repairs to be done. But in the home port, where the owner resides, where he can be consulted, and where he can personally interfere, no such necessity exists, and there is no reason why the master should pledge his credit even for necessary repairs without special authority. See to the same effect, *Gunn v. Roberts*, L. R. 9 C. P. 331; *Arthur v. Barton*, 6 M. & W. 142; *Myers v. Willis*, 17 C. B. 103; 18 C. B. 887; *Mitcheson v. Oliver*, 5 E. & B. 444; *Bernard v. Aaron*, 11 C. B. N. s. 889; *Hibbs v. Ross*, L. R. 1 Q. B. 534; *The Troubadour*, L. R. 1 Ad. & Ec. 303; *The Great Eastern*, L. R. 2 Ad. & Ec. 88; *Schooner Freeman v. Buckingham*, 18 How. 182; *Thomas v. Osborn*, 19 How. 22; *Morgan's Assignees v. Shinn*, 15 Wall. 110; *Howard v. Odell*, 1 Allen, 85; *Blanchard v. Fearing*, 4 Allen, 118; *Webb v. Peirce*, 1 Curt. 104; *Mayo v. Snow*, 2 Curt. 102; *Macy v. Wheeler*, 30 N. Y. 241; *Reems v. Lewis*, 2 Paine, Cir. Ct. 202; *Stedman v. Feidler*, 25 Barb. 605; *The Phœbe*, 1 Ware, 269. And the fact that the master was part-owner at the time does not confer upon him any greater authority to pledge the credit of his co-owners for work done and materials furnished the vessel without their authority. *Pentz v. Clark*, 41 Md. 327; *Gates v. Thompson*, 57 Me. 442; *Helme v. Smith*, 7 Bing. 709.

In *The Robert L. Lane*, 1 Lowell, 388, the power of the master to hypothecate the vessel was upheld, where he had communicated with his owners, and they through their silence and neglect, after full and sufficient communication had been made to them, left him no alternative but to sell or hypothecate. The court held that their silence and neglect authorized him to take such measures as were most expedient, and such as a prudent master would take who could not communicate with his owners; that as his alternative was to sell or hypothecate it could not be maintained that he had a more ample implied power to sell than to hypothecate. On the contrary, they held he had less; "for hypothecation on its face is a sacrifice of part, while a sale usually sacrifices

the whole." But the master cannot pledge a vessel by giving a bottomry bond for money borrowed for repairs when the owners of the vessel are present at the place where the repairs are made, or where he has funds of the owners for the purpose which he has not used. *Patton v. The Schr. Randolph, Gilp.* (Dist. Ct.) 457. See *Tunno v. Ship Mary*, Bee's Adm. R. (A. D. 1785) 120; *Sloan v. Ship A. E. 1.*, Bee, 250; *Turnbull v. The Enterprise*, Bee, 345.

In an action brought to recover the value of a chronometer, let in New York to a vessel belonging to Maine, it was laid down that the master is the agent of the owners for the purpose of obtaining repairs and supplies for the ship in a foreign port in the absence of the owner, but his authority as such agent is not unlimited. He can only procure such supplies and repairs as are, properly speaking, necessary for the ship; that is, the repairs and supplies are to be such as are reasonably fit and proper, having regard to the exigencies and requirements of the ship, for the port where she is lying and the voyage on which she is bound. *The Fortitude*, 3 Sumn. 233; *Edwards v. Havell*, 14 C. B. 107; *Mitcheson v. Oliver*, 5 El. & Bl. 419.

It is nowhere said that this authority of the master is limited to the purchase or procurement of any particular kind or class of supplies. On the contrary, it is uniformly held that it embraces everything which a prudent man would deem proper and necessary to be done or supplied under the circumstances. The true and only test by which to determine whether the master has acted within the limits of his authority is to ascertain whether the articles or supplies, whatever may be their nature, were necessary under the circumstances in which the vessel was placed. No abstract rule can be laid down by which certain articles designed and intended for the use of the vessel are in all cases to be included as coming within the authority of the master to procure on the credit of his owners, and others are to be excluded as falling without the limits of such authority. The necessity may vary according to the circumstances of each particular case, and, when called in question in an action at law, it can only be determined by a jury on a consideration of all the facts which go to make up the exigencies and requirements of the vessel at the time the articles were procured and the credit given. *Bliss v. Ropes*, 91 Mass. 339, 341.

The following additional cases further exemplify the principles governing the powers of a shipmaster to bind the vessel,

could justify the sale of the vessel by the master. The abandonment was based on the damage done to the vessel at the time of

cargo, owners, and all concerned, by his acts in a foreign port for necessities, by hypothecation, and by sale. *Crawford v. The William Penn*, 3 Wash. 484; *The American Ins. Co. v. Coster*, 3 Paige, 323; *Ross v. The Ship Active*, 2 Wash. 226; *Reade v. The Commercial Ins. Co.*, 3 Johns. 352; *The Bark Herald*, 8 Bened. 409; *Barker v. York*, 3 La. Ann. 90; *Webb v. Pierce*, 1 Sprague, 192; *The Lulu*, 1 Abbott (U. S.), 191; *Selden v. Hendricksen*, 1 Brock. 396; *The Never-sink*, 5 Blatch. 39; *The Jeanie Landles*, 17 Fed. Rep. 91; *Descadillas v. Harris*, 8 Me. 296; *Whitten v. Tisdale*, 43 Me. 451; *Leddo v. Hughes*, 15 Ill. 41; *James v. Bixby*, 11 Mass. 34; *The Brig Eledona*, 2 Bened. 31; *The Brig Jacmel Packet and her Cargo*, 2 Bened. 107; *The Steamboat Washington Irving*, 2 Bened. 318, 323.

The principle relating to the master's authority to contract for supplies and repairs at the home port is quite different from that governing his powers at a foreign port; the nature of his agency, from the differing circumstances surrounding him, being of a different and much more restricted character where the owners of the vessel are present to act for themselves, and therefore, do not as necessarily nor usually to as great an extent require the action of the master, as where they are distant from the scene, and have no power to act for themselves. Thus, the master has not usually authority to pledge the credit of the owner for necessary repairs made at the home port, where the owner resides and can be consulted, and can personally interfere, unless the owner has held out the master as having such authority, or has ratified his contracts. The reason of this is that the foundation and nature of the authority of the master arises from the requirements of the peculiar and responsible duties of his position, and his authority must be commensurate with those duties. When the reason for his authority disappears, then his authority ceases; therefore, the authority of the master to bind the owners of the vessel is more extensive abroad than in a home port. In foreign ports (and ports of States other than where the vessel belongs are for that purpose considered foreign ports) it is uniformly held that the master has authority to contract on the credit of the owner for such supplies and repairs as are reasonably fit and proper for the ship and the voyage. This authority arises from the necessity of procuring the supplies, the absence of the owner, and the presumption that if he had been consulted

he would as a prudent man have procured them, and would not have allowed the voyage to be broken up or the ship to suffer for want of them. It is only so far and just to the extent that the reason and necessity for such authority ceases in a home port, that the authority of the master is restricted. It is no inflexible rule arising from statutory legislation or any question of jurisdiction, and the restriction should not be pushed farther than the reasons of it require. When, therefore, although the port where materials or supplies are furnished may be in one sense a home port, if it is not the port where the owner resides, and if he is not within easy access of it, and the repairs or supplies are not unusual in amount, and are such as a reasonable and prudent owner would have sanctioned if present, it has been held that the master has power to bind the owner. *Schultz v. Bosman*, 5 Hughes, 97; *John v. Simons*, 2 Q. B. 424; *Stonehouse v. Gent*, *Ibid.* 431, note (b).

Of course, the supplies and repairs which are reasonably fit and proper, under such circumstances, for the master to contract for upon the credit of the owner without consulting him, are much more restricted as to kind and amount than would be the case in a foreign port, and greater caution and inquiry in giving the credit should be exercised by the material man before furnishing them. *Schultz v. Bosman*, 5 Hughes, 97. But the rule may be considered generally correct that the master of a vessel without any other authority than that derived from his official capacity is not entitled to order repairs to be made in a home port. *Jordan v. Young*, 37 Me. 276; *Dyer v. Snow*, 47 Me. 254. And where the vessel was lying at a wharf in Portland, Maine, and the owner was a resident of the adjoining town of Cape Elizabeth, the principles as to the home port were held to apply. *Jordan v. Young*, 37 Me. 276. And authority to give a promissory note at a home port by a master to bind the owner, is not to be implied from the relation that subsists between master and owner. *Gregg v. Robbins*, 28 Mo. 347. Nor to give a bond to release a vessel from seizure. *Carr v. Burke*, 32 Mo. 233.

Where in the same State the legal owner of a vessel resided in the city of New York, and the master, who was the actual owner, obtained, in Buffalo, the plaintiff as bail for the vessel's discharge upon her being libelled for illegally carrying passengers, no communication having

the accident which had happened to her. If accepted, the master became the agent of the insurer; and whether accepted or not, his act, without authority, could receive no ratification from allegations or admissions made by any party in a dispute on the contract of assurance, where the inquiry as to the act of the master was irrelevant. The claimant, having obtained possession unlaw-

been made to the legal owner, he was held not liable to the plaintiff for the amount the plaintiff was compelled to pay as surety on the bond. *Gager v. Babcock*, 48 N. Y. 154. In *Crawford v. Roberts*, 50 Cal. 235, it was held that the master's power is presumed, in the absence of evidence to the contrary, to extend to making contracts for supplies in the home port which shall bind the owners; the duties and relations of the master furnishing presumptive evidence of his authority to purchase supplies. *Provost v. Patchin*, 9 N. Y. 235; *Rich v. Coe*, Cowp. 636; *Hussey v. Christie*, 9 East, 432; *Hoskins v. Slayton*, Cas. Temp. Hardw. 360; *James v. Bixby*, 11 Mass. 40; *Flanders v. Merritt*, 3 Barb. 201. And if the purchases are made by the master with the knowledge and consent of the ship's husband, the owners are *prima facie* liable. *Crawford v. Roberts*, 50 Cal. 235. And for the necessary supplies of the vessel even at the home port, furnished by order of the master, the owner is generally liable, as agency to that extent is usually to be implied; and when he seeks to escape the liability he must make out by satisfactory proof the facts upon which he claims the exemption. *Abbott v. B. & R. Steam Packet Co.*, 1 Md. Ch. 542.

In *Robinson v. Georges Ins. Co.* 17 Me. 131, it was held that where a vessel had been stranded on a sand bar within the United States, and within one hundred miles of the place of holding a court of the United States for the district, and had been put afloat and repaired by salvors, the master had no power to refer the claim for salvage to arbitration without the consent of the owners. But in a case of great necessity, where there were thirteen owners of a vessel, living in different States, and with whom it would have been difficult to communicate with the necessary promptness, their agent being present on the spot where the repairs were made, and presumably approving of them, it was held that though the general principle is correct that if the owner or his agent for the purpose is either at the port or at such a convenient distance that the master can have communication with him without such a delay as would materially prejudice his interests, the authority of the master to bind the owner for repairs does

not exist; yet, under the circumstances, the master has a right to charge the owners with such expenses for repairs, even at a home port, as the interests of the owners render it necessary that he should incur. *Woodruff & Beach Iron Works v. Stetson*, 31 Ct. 51; *Webster v. Seekamp*, 4 B. & Ald. 353; *John v. Simons*, 2 Q. B. 425.

In *Steamboat Lehigh v. Knox*, 12 Mo. 508, it was held that in order to give a lien on the steamboat for supplies furnished it is not necessary for the party furnishing such supplies to ascertain whether the master or agent actually in possession, and having control of the steamboat, is legally entitled to that possession and control; the presumption being that he is so. In accordance with the principle that where the owner is in such a position to be communicated with, when any unusual act is to be taken in respect to the vessel, the master's act is not binding on the vessel or owner without such communication, it was held in *The Giulio*, 27 Fed. Rep. 318, where a master executed an instrument which amounted, in legal effect, to a contract of bottomry, and he was at the time within easy reach of the owner by telegraph, where a letter would have reached him in five days, and where the owner was in actual communication with the master, and was not notified of the master's intention to borrow money on the security of the vessel, nor his approval obtained, the instrument was invalid. And see *Astrups v. Leroy*, 19 Fed. Rep. 536; *Miller v. Thompson*, 60 Me. 322; *Gates v. Thompson*, 57 Me. 442; *Acatos v. Burns*, 7 Ex. Div. 282; *The Australasian Steam Nav. Co. v. Morse*, L. R. 4 P. C. 222; *The Bonaparte*, 8 Moo. P. C. 459; *The Cargo ex Hamburg*, 2 Moo. P. C. N. s. 289; *The Lizzie*, L. R. 2 Ad. & Ec. 254; *Atkinson v. Stephens*, 7 Ex. 567; *Ewbank v. Nutting*, 7 C. B. 297; *Freeman v. The East India Co.*, 5 B. & Ald. 617; *Cammell v. Sowell*, 3 H. & N. 634; *The Gratitude*, 3 C. Rob. 240; *The Julia Blake*, 107 U. S. 418; 16 Blatchf. 472; *The C. M. Titus*, 7 Fed. Rep. 826, 831; *Butler v. Murray*, 30 N. Y. 88, 99; *The Joshua Barker*, Abb. Adm. 215; *Pope v. Nickerson*, 3 Story, 465; *Myers v. Baymore*, 10 Pa. St. 114; *Pike v. Balch*, 38 Me. 302.

fully, was a trespasser, and could no more plead the abandonment as a confirmation of his title than if he had obtained it by theft or piracy. Moreover, if the circumstances would have justified a sale by the master, no abandonment was necessary. It could not, therefore, by any possible implication, amount to a confirmation of such sale.¹

In *The Turgot*,² it was argued that the master had an implied authority to pledge the owners' credit as their agent *ex necessitate*, in order to enable the ship to sail, and *The Beeswing*³ was cited as an authority. But this (*The Turgot*) was a case where, by charter-party, it was agreed that the owners of the ship should provide and pay for provisions and wages, and that the charterer should provide and pay for coals and other expenses. The master was to be appointed by and to follow the instructions of the charterer. The master, with notice of the charter-party, ordered and made himself liable for provisions and coals for the vessel at a foreign port. These provisions and coals were necessary to enable the vessel to perform her voyage. It was held, in an action by the master against the vessel, that he was entitled to recover for the provisions but not for the coals, as by the terms of the charter-party he had no power to pledge the owners' credit in respect of them. The agency from necessity did not exist. The charterers were bound to pay for the hire of the vessel during its detention, and the owners, therefore, had no interest in obtaining its immediate departure.

In *Gaudet v. Brown, Cargo ex "Argos,"*⁴ it was held that where a ship had a cargo of petroleum on board, which he was unable to land at the port to which it was consigned, the authority of the master being founded on necessity, and he being unable to obtain instructions from the shipper or his assignees, and being unable to land and warehouse the cargo at the expense of the owner of it, he was not justified in destroying the cargo, but, in the absence of advices, he might take it to such a place as, in his judgment, was most convenient for the merchant, and might charge to the merchant all expenses properly incurred, including back-freight. And as the master, as agent of necessity, must act for the protection of the interests committed to him, if he have an apprehension of capture founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment, and experience, delay in the prosecution of a voyage will be justified, and the ship will not be answerable for damage to the cargo caused by such delay.⁵

¹ *Ward v. Peck*, 18 How. 267.

² 11 Pr. Div. 21.

³ 53 L. T. N. s. 554.

⁴ L. R. 5 P. C. 165.

⁵ *Anderson v. The Owners of the San Roman*, L. R. 5 P. C. 301. In *Chapman*

The question of the authority of the master of a ship to sell goods which he is carrying, where there was an opportunity of communicating with the owner of the goods, came up and was decided in *Acatos v. Burns*¹ in the Court of Appeal. The plaintiff shipped a quantity of Indian corn on board the defendants' ship at Constantinople for Liverpool. On arrival of the ship at Smyrna, a port of call, the corn was found to be so damaged as to render it dangerous to the ship and cargo to carry the corn further. In consequence of its condition it was unloaded and sold by the master at Smyrna. An action was brought against the defendants for conversion. On the trial it was shown that the master communicated with the ship's agent at Constantinople, and received information back that the shipper protested against the corn being sold. It was, however, under the advice of Lloyd's agent, sold. The jury found that the defendants could have communicated with the owners of the corn before they sold it; that the sale under the circumstances was not one of such urgent necessity as to give no time or opportunity for communicating with the owner; but that the sale of the corn in the manner the defendants sold it was a prudent measure. Judgment was entered for the plaintiff and the defendants appealed. The court affirmed the judgment.²

v. Morton, 11 M. & W. 533, where goods were sold by the defendant, it was claimed that his sale was lawful, as the circumstances of the case placed him in the position of an agent of necessity for the plaintiff, and that in that capacity he sold the goods for the price of which the action was brought. But the court held that the circumstances did not create such a relation between the parties. But it has been held that if the vendee wrongfully refuse to accept goods contracted for, the vendor, as his agent by necessity, may re-sell the goods on his account, and in an action for the price of the goods recover the difference between the contract price and the price on the re-sale. *Sands v. Taylor*, 5 Johns. 395; *Girard v. Taggart*, 5 S. & R. 19. And such an agency is sometimes created by necessity, in the case of a necessity arising for the sale of perishable articles. See *Chapman v. Morton*, 11 M. & W. 536, 538, 540.

¹ 3 Ex. Div. 282.

² Brett, L. J., makes the law in the case clear, thus: "Had the master authority to sell, and was the sale lawful or wrongful? On the present findings we must take it that the goods were of a perishable nature, and had an inherent vice at the time of shipment, and that was the cause of their being landed at

Smyrna, and if something had not been done with them they would have perished. The sale was a reasonable sale as regards the nature and condition of the goods, but it was a sale without the consent of the owner. The question therefore is, whether the master, under such circumstances, had authority to sell the goods? The first point made was that the authority of the master to sell goods is to be measured differently when the goods become perishable, owing to their own inherent vice at the time of shipment, and when they become so from being damaged by perils of the sea. There is no ground for any such distinction. The authority of the master is the same whether the sale is rendered necessary from injury arising from the inherent vice of the goods or from sea damage. *Prima facie*, the master has no authority to sell. He may have such authority under certain circumstances which may arise from something happening to the ship, or from something happening to the cargo; but the law of England looks with jealousy on the master selling any part of the cargo without the consent of its owner, and it gives the master no authority unless there is an urgent necessity for the sale. Now, an urgent necessity for a sale may arise from several causes. There may be an

Repairs such as are necessary to remove the inability of the ship to proceed on her voyage, cannot be made by the master unless he has means or credit, and if he have neither, and his situation is such that he cannot communicate with the owners, he may sell a part of the cargo for that purpose if it is necessary for him to do so in order to raise the means to make the repairs. Sacrifices made to raise such means are the subject of general average, and the rule is the same whether the sacrifice was made by a sale of a part of the cargo, or by the payment of marine interest.¹

In the case of the sale by a master of ship and cargo, the original owners claimed the cargo on the ground that the sale by the master was unjustifiable. The claimants averred that the sale was a fair, honest, and valid sale of the property, made from necessity, in good faith, and for the best interests of all concerned, and that they were the rightful and *bonâ fide* owners of the portions of the cargo purchased by them.² The District Court decreed in favor of the claimants. On appeal to the Circuit Court, this decree was reversed; the sale being pronounced void, and the respondents treated as salvors only, and were permitted to retain a moiety of the proceeds of the property as salvage. On appeal to the Supreme Court this decision was affirmed. The facts of the case were peculiar, and the court held that the cases justifying a sale assume the fact of a sale in a civilized country, where men have money, and where there is a market and competition; but that they have no application to wreck in a distant ocean, where the property is derelict, or about to become so, and the person who has it in his power to save the crew and save the cargo, prefers to drive a bargain with the master. The necessity in such a

urgent necessity to sell goods, arising from the fact that if the goods are not sold they will perish, or that they will have to be kept in warehouses at great expense, so that as a matter of business it would be wrong to warehouse them; and it must be shown that the master has no means of communicating with the owner, and taking his directions whether he shall sell them or not. But, I think, whether the goods are of a perishable nature or not, if the master has an opportunity of communicating with the owner before they actually perish, he cannot sell without communicating with the owner and obtaining his directions; and if the master obtains directions, and the owner of the goods refuses his consent to a sale, the master cannot sell, although the goods are of a perishable nature. It is not necessary to lay down rules as to what the master should do in every case, but clearly he

has no right to sell after receiving directions to the contrary. The jury here have found that there was no urgent necessity for a sale; therefore in the present case the sale was wrongful." *Acatos v. Burns*, 3 Ex. Div. at p. 259. See *Cobequid Mar. Ins. Co. v. Barteaux*, L. R. 6 P. C. 319; *Tronson v. Dent*, 8 Moo. P. C. 419, 448; *Notara v. Henderson*, L. R. 5 Q. B. 346; *Brass v. Maitland*, 6 E. & B. 471; *Australasian Steam Nav. Co. v. Morse*, L. R. 4 P. C. 222; *The Cargo ex Hamburg*, 2 Moo. P. C. N. S. 239.

¹ *Star of Hope*, 9 Wall. 203. 237; *Orrok v. Commonwealth Ins. Co.*, 21 Pick. 469. See further, *Dupont v. Vance*, 19 How. 162; *Barnard v. Adams*, 10 How. 303; *Patten v. Darling*, 1 Cliff. 262; *Lawrence v. Minturn*, 17 How. 110; *Potter v. Ocean Ins. Co.*, 3 Sumn. 42; *The Brig Mary*, 1 Sprague, 18.

² *Post v. Jones*, 19 How. 150.

case may be imperative, because it is the price of safety, but it is not of that character which permits the master to exercise his power of sale. And the claimants were, accordingly, decreed to be salvors, and not purchasers of the cargo.¹

Material-men have a lien on the ship, which may be enforced by a proceeding in the admiralty, *in rem*, for necessities or supplies, furnished in a port to which the vessel is foreign; and so, if she be held out as foreign, and supplies are furnished on the faith that she is so.²

Necessaries furnished to a vessel in a foreign port, specifically ordered for her by name, delivered to the officers in charge of her, and indispensable to enable her to make her voyage, and where there is no reason to suppose that the master had funds, or the owners of the vessel credit, and the party selling the necessities was not guilty of laches; the inference is that the credit was given to the vessel, and this inference is not rebutted by the fact that in the seller's journal there is an entry under the names of the owners of this and other vessels, the items in the entry being placed opposite the name of each specific vessel, to which they were supplied, and being charged at the lowest cash price. Inasmuch as the goods were thus supplied, and in a foreign port, the presumption of law is that the credit was given to the vessel and not to the owners.³

The liability of the owner of a vessel to pay for repairs and equipments ordered by the master, depends not upon the ground of the ownership of the vessel, but upon the ground of a contract made with the vendor by a person who was the owner's agent for the purpose of ordering such necessities. The master's contract cannot bind the owner unless authority to bind the owner has been actually given to him; or unless the owner has by word or deed held out the master as his master, and thereby induced the vendor to supply the necessities upon the credit of the owner. The question came up in the case of *The Great Eastern*,⁴ where the owners of a vessel entered into an agreement and charter-party, by which it was provided, *inter alia*, that the master, officers, and crew, should be appointed by the owners, be under their control, and be dismissed by them, but that their wages should be paid by the charterer; and it was also provided that the master should act as supervisor of the repairs and fittings of the ship. An action having been brought for necessities supplied to the ship while under this charter, by the master's order, who stated

¹ See *The Tilton*, 5 Mason, 477; *The Sarah Ann*, 2 Sumn. 217; 13 Peters, 402.

² *The St. Jago de Cuba*, 9 Wheat. 409.

³ *The Patapsco*, 13 Wall. 329; *The Lulu*, 10 Wall. 192.

⁴ L. R. 2 Ad. & Ec. 88.

in his evidence that he considered himself as acting for and as the servant of both owners and charterer, it was held that the owners had held out the master as their master, and that they were, therefore, liable for the debt.¹

The plaintiffs wishing to send cement and stone from London to Callao, the defendants, on June 24, wrote, offering them "room" for it in the ship *F. K. Dumas*, and on June 25, the defendants chartered the ship of the owners for a voyage from London to Callao, by a charter-party, providing, *inter alia*, that the whole ship should be at the disposal of the charterers, except the space necessary for the crew and stores; that the master and owners should give the same attention to the cargo, and in every respect be responsible to all whom it might concern, as if the ship were loaded in her berth by and for the owners independently of the charter; that the master was to sign bills of lading at any rate of freight the charterers might require without prejudice to the charter-party; that the ship should be addressed to the charterers' nominees at the port of discharge; and the charterers' responsibility, except for freight, was to cease on the vessel being loaded. On June 26, an agreement was made between the defendants, "acting for the owners" of the ship, and the plaintiffs, that the former should receive on board cement and stone at a certain freight from London to Callao, and sail on a certain date. Freight to be paid one-half on signing bills of lading, and the remainder on final discharge at Callao. The cement and stone were shipped, half freight was paid, and the master signed bills of lading, making the other half payable at Callao; and the ship sailed, but being damaged by bad weather, put into an intermediate port, where she was condemned, and the captain sold the plaintiffs' goods, believing that he was unable to forward them. The plaintiffs having sued the defendants for the value, the jury found that the sale was not justified. Denman, J., on consideration, held that the captain in selling the goods was not acting as the servant or agent of the defendants, and they were not, therefore, liable for the conversion.² The case came up

¹ See *Frost v. Oliver*, 2 E. & B. 301; *Mitcheson v. Oliver*, 5 E. & B. 419; *Dean v. Hogg*, 10 Bing. 350; *Hutton v. Bragg*, 2 Marsh. 339.

² *Wagstaff v. Anderson*, 4 C. P. D. 283. For further cases applicable to the point involved, see *Mitcheson v. Oliver*, 5 E. & B. 419; *Shipton v. Thornton*, 9 A. & E. 314; *Acatos v. Burns*, 3 Ex. Div. 282; *Sandeman v. Saur*, L. R. 2 Q. B. 86; *Gilkinson v. Middleton*, 2 C. B. N. S. 134; *Lloyd v. Guibert*, L. R. 1 Q. B. 115;

Hunter v. Prinsep, 10 East, 378; *Wilson v. Dickson*, 2 Stark. 1; 2 B. & Ald. 2; *The Gratitude*, 2 C. Rob. 240; *Notara v. Henderson*, L. R. 7 Q. B. 225; *Quarman v. Burnett*, 6 M. & W. 499; *Tobin v. The Queen*, 33 L. J. C. P. 199, 204; *Hingston v. Wendt*, 1 Q. B. Div. 367; *Tronson v. Dent*, 8 Moo. P. C. 419; *Doolan v. Midland Ry. Co.* 2 App. Cas. 792; *Hayn v. Calliford*, 3 C. P. Div. 410; *Colvin v. Newberry*, 1 Cl. & F. 283; *Ewbank v. Nutting*, 7 C. B. 797.

again, on appeal, to the Court of Appeal, when the judgment of Denman, J., was sustained.¹

Where the master of a ship, without any authority from the owners of the ship or cargo, executes bottomry bonds on ship, freight, and cargo, under circumstances which justify him as agent of necessity in doing so, for repairs to the ship, and where the contract of affreightment does not otherwise provide, as between the parties to the contract, in respect of sea-damage and its incidents, the law of the country to which the ship belongs must be taken to be the law to which they have submitted themselves. Thus, the plaintiff, a British subject, chartered a French ship belonging to French owners at a Danish West India port, for a voyage from St. Marc, in Hayti, to Havre, London, or Liverpool, at charterer's option. The charter-party was entered into by the master in pursuance of his general authority as master. The plaintiff shipped a cargo at St. Marc for Liverpool, with which the vessel sailed. On her voyage she sustained sea-damage, and put into Fayal, a Portuguese port, for repair. There the master properly borrowed money on bottomry of ship, freight, and cargo, and repaired the ship, and she completed the voyage to Liverpool. The bond-holder proceeded in the Court of Admiralty against the ship, freight, and cargo. The ship and freight were insufficient to satisfy the bond, and the deficiency with costs fell on the plain-

¹ Wagstaff v. Anderson, 5 C. P. D. 171. Thesiger, L. J., thus dealt with the question of the alleged agency of the master: "The plaintiffs contend that the defendants are responsible for the act of the master of the ship in selling the goods at Monte Video, on the grounds that the master in selling was the agent of the defendants; that being agent of the defendants, he was acting within the general scope of his authority, and that consequently, although in this particular case the sale was and has been found by the jury to be unjustifiable, yet the defendants are responsible for the act of their agent, upon the principle laid down in *Ewbank v. Nutting*, 7 C. B. 797, and similar cases. This contention involves several propositions. The plaintiffs have to make out that the master was the agent of the defendants, and I am of opinion that in this they have failed. The goods, the sale of which is the subject of dispute, were carried under a bill of lading, and, *prima facie*, the master, in signing that bill of lading, would be acting on behalf of the persons who were the shipowners, and the shipowners would be the persons responsible for the carriage of the goods, and for all things to which the agent

would be able to bind the shipowners in connection with the goods. But it is open to the plaintiffs to negative the presumption of the liability of the shipowners in two ways, — either by showing that the transactions between the shipowners and the defendants were such as really put the defendants, for that particular voyage, in the position of the shipowners, according to the principles laid down in *Colvin v. Newberry*, 1 Cl. & F. 283; or that, although the transactions between the shipowners and the defendants did not put the defendants in the position of shipowners, yet they had so conducted themselves, or so contracted with the shippers of the goods, as to make themselves personally responsible." And on a full examination of these two questions, the conclusion was reached, concurred in by all the other judges, that the goods were not carried under any contract under which the defendants were personally liable, but were carried under the bill of lading signed in the ordinary way by the captain of the ship, and binding as between the plaintiffs and the shipowners, whose captain he was; and the judgment of Denman, J., was affirmed.

tiff, as owner of the cargo, for which he sought indemnity against the defendants, the French ship-owners. The defendants gave up the ship and freight to the shipper, so that, by the alleged law of France, the abandonment absolved them from all further liability on the contract of the master. By the English law, a ship-owner, under such circumstances, is liable personally, and not merely to the value of the ship and freight. It was held that the parties must be taken to have submitted themselves, when making the charter-party, to the French law as the law of the ship, and, therefore, that assuming the law of France to be as alleged, the plaintiff's claim was absolutely barred.¹

On April 19, 1875, an Austrian ship, with a valuable cargo on board, ran upon a rock on the eastern side of Algoa Bay, distant fifty miles by sea and about eighty miles by land from Port Elizabeth. The Austrian consul at Port Elizabeth came to the spot, and there being no hope of getting the vessel off, he advised the master to sell her with the cargo. The master accordingly advertised the ship and cargo for sale, and they were sold in one lot by auction, on April 30, for £9,500, after a brisk competition. The purchaser got some part of the cargo out of the wreck, but on June 19, the ship went to pieces with the rest of the cargo on board. The owners of the cargo having abandoned it to the underwriters as a total loss, the underwriters filed their bill to have the goods which had been brought to land, delivered to them as not having been effectually sold. The master had not gone to Port Elizabeth, nor endeavored to procure funds to enable him to save the cargo; nor had he made any effort to induce any persons to undertake the salvage of the cargo. Several witnesses at Port Elizabeth deposed that in their opinion no person could have been induced to undertake the salvage; others gave their opinion that offers to save the cargo could have been obtained if a large percentage of the net proceeds had been offered. There was a good deal of evidence to show that, in the opinion of persons on the spot, the course which had been adopted of selling the wreck and cargo, was the most advisable one in the interest of all parties concerned. And it was held by the Court of Appeal (affirming the decision of the Master of the Rolls), that no

¹ *Lloyd v. Guilbert*, L. R. 1 Q. B. 115, in the Exchequer chamber, affirming the judgment of the Court of Queen's Bench, 33 L. J. Q. B. 241. See also *Dakin v. Oxley*, 15 C. B. N. s. 646; 33 L. J. C. P. 115; *Blasco v. Fletcher*, 14 C. B. N. s. 147; 32 L. J. C. P. 284; *Arayo v. Currell*, 1 La. 528; *Pope v. Nickerson*, 3 Story, 465; *Durant v. Hart*, 2 Moo. P. C. N. s. 239; 33 L. J. P. M. & A. 116; *Rob-*

ertson v. Jackson, 2 C. B. 412; *Hudson v. Clementson*, 18 C. B. 213; 25 L. J. C. P. 234; *Gattorno v. Adams*, 2 B. & C. 805; *Simonds v. White*, 2 B. & C. 805; *The Peninsular & Oriental Co. v. Shand*, 11 Jur. N. s. 771; *Brown v. Gracey*, note to *Lacon v. Higgins*, D. & R. 41, n.; *Duncan v. Benson*, 1 Ex. 537; *Benson v. Chapman*, 2 H. L. Cas. 696.

such necessity was proved to have existed as would make the master the agent of the owners of the cargo to effect a sale; that the sale was void; and that the plaintiffs were entitled to the cargo saved, subject to a proper allowance for salvage and other expenses.¹

In the *Julia Blake*,² the United States Supreme Court laid down the law as to the powers of the ship-master to sell or hypothecate the cargo, in the same manner as has been done in the English cases, namely, that the master can neither sell nor hypothecate the cargo, except in case of urgent necessity, and his authority for that purpose is no more than may reasonably be implied from the circumstances in which he is placed. He acts for the owner of the cargo because there is a necessity for some one to do so, and, like every agent whose authority arises by implication of law, he can only do what the owner, if present, ought to do. Necessity develops his authority and limits his powers. What he

¹ *Atlantic Mutual Ins. Co. v. Huth*, 16 Ch. Div. 474. Cotton, L. J., in delivering the judgment of the Court of Appeal, laid down the following principles: "The rule laid down in the cases where the sales of cargo have been questioned is, that the master becomes agent for sale of the cargo; that is, has authority to sell, so as to bind the owners of the goods entrusted to him for a different purpose, namely, carriage to their port of destination, only where there is a necessity for that course, and that it lies on those who claim title to cargo, as purchasers from the captain, to prove that this necessity clearly existed; further, that it is not sufficient to prove that the master thought he was doing the best for all concerned, or even that the course adopted was, so far as can be ascertained, the best for all concerned. (See *Tronson v. Dent*, 8 Moo. P. C. 419; *Acatos v. Burns*, 3 Ex. D. 282.) The principle is, that the master is authorized by the owners only to convey the goods to the port of discharge, and that nothing but necessity can authorize him to adopt any other course of action. We do not enter into the question whether what will justify a sale is to be called extreme or stringent, or the strongest necessity, or commercial necessity. In our opinion, purchasers of cargo from a master cannot justify the sale unless it is established that the master used all reasonable efforts to have the goods conveyed to their destination, and that he could not by any means available to him carry the goods, or procure the goods to be carried, to their destination as merchantable articles, or could not do so

without an expenditure clearly exceeding their value after their arrival at their destination. Here the sale was of the ship and cargo as an entirety, and a large and valuable part of the cargo was tin, which, if saved from the wreck, would have been practically uninjured, and certainly capable of being sent on in a merchantable state. The question therefore is, whether it is established that the master could not, with the means available to him, have landed, or procured to be landed, at least this portion of the cargo." And, then, after stating the facts, — "It is, in our opinion, under these circumstances, impossible to hold that it is established that the captain could not have induced some person to undertake the salvage of the cargo. Certainly the master did not use all means within his power, or make any effort either to procure funds for enabling him to save the cargo, or to induce others to save the cargo. For both reasons, we are of opinion that it is not shown that there was such a necessity for the sale as would authorize the master to sell, or make him the agent of the owners for that purpose." See further, *The Karnak*, L. R. 2 P. C. 505, 512; *The Gratitude*, 3 C. Rob. 240, 258; *The Australia*, Swab. 480; *The Margaret Mitchell*, Swab. 382; *Hayman v. Molton*, 5 Esp. 65; *Underwood v. Robertson*, 4 Camp. 138; *Freeman v. East India Co.*, 5 B. & Ald. 617; *The Segredo*, 1 Spinks, 36; *The Eliza Cornish*, 1 Spinks, 46, 47; *The Theodore*, Swab. 351; *The Firefly*, Swab. 240; *Idle v. Royal Ex. Ass. Co.*, 3 Br. & B. 151; *The Glasgow*, Swab. 145.

² 107 U. S. 418.

does must be directly or indirectly for the benefit of the cargo, considering the situation in which it has been placed by the accidents of the voyage.¹

And the lender, upon the hypothecation of the cargo by a master of the vessel under his implied authority, is chargeable with notice of the facts on which the master appears to rely as a justification for what he is doing. Such a lender is presumed to know that the power of the master is to be determined by the necessities of the case in their legal operation on the owner of the cargo. As necessity creates the agency, and that only can be authorized which, under the circumstances, is reasonable and just, he must make his own inquiries and judge for himself, and at his own risk, whether if the owner were present, he would do or ought to do that, or something equivalent, which the master is undertaking to do for him in his absence. A lender cannot shut his eyes to existing facts as they appear, or, by reasonable inquiry, could be made to appear, and treat with the master as a general agent, having authority to do not only what the owner ought to do, but what he might do if he chose. Before there can be a recovery against the owner, it must be shown that the circumstances were such as to make it apparently proper for the master to do what he has done. To this extent the burden of proof is clearly on the lender. The rule is applied also to the hypothecation of the ship by the master, where less strictness will ordinarily be required than in the hypothecation of the cargo, because the master is the appointed agent of the owner of the ship, but the involuntary agent of the owner of the cargo.²

And where it is for the interest of the shipper that his property should be forwarded by some other vessel rather than that it should be hypothecated to pay for repairs, and where the facts point to the conclusion that such repairs could not be effected without an expense to him of more than it would cost to reclaim his property; to pay all lawful charges on it, and to send it forward by some other conveyance; the master has no authority to pledge the cargo without the consent of the shipper or consignees.³

Maritime hypothecations had their origin in the necessities of commerce, and they are said to be the creatures of necessity and distress. When properly authorized and duly executed, they are of a high and privileged character, and are held in great sanctity

¹ *The Gratitude*, 3 C. Rob. 240, 261; *Pet.* 387, 400; *The Amelie*, 6 Wall. 18, 27; *Duncan v. Benson*, 1 Exch. 557; *The Onward*, L. R. 4 Ad. & Ec. 38, 57; *Ross*

v. The Ship Active, 2 Wash. C. C. 223, 237; *The Packet*, 3 Mason, 255, 259; *New England Ins. Co. v. The Sarah Ann*, 13 Osborn, 19 How. 22; *The Amelie*, 6 Wall. 18; *The Grapeshot*, 9 Wall. 129; *The Lulu*, 10 Wall. 192.

³ *The Julia Blake*, *supra*.

by maritime courts.¹ The United States Supreme Court held, in *Insurance Company v. Gossler*,² in the case of a bottomry bond, that as long as the ship exists *in specie*, the bond attached to her, and that, under the terms of the bond in this case, the bond-holders had a claim on the cargo saved as against the underwriters on it to whom it had been abandoned and assigned, for the unpaid balance on the bond.

In *Thomas v. Osborn*,³ it was conceded that, in England, it has been definitely settled that by the law of England the master of a ship has not power to create a lien on the vessel for the payment for repairs and supplies obtained in a foreign port, save by a bottomry bond; that he can only pledge his own credit and that of his owners, but cannot, by any act of his, give the creditor security on the vessel, while, at the same time, the personal liability of the owners continues. These decisions rest upon the want of authority in the master, to create, by his own act, an absolute hypothecation of the vessel as security for a loan. But, it was affirmed that the maritime law of the United States is settled otherwise, in harmony with the ancient and general maritime law of the commercial world; that the master of a vessel of the United States being in a foreign port, has power, in case of necessity, to hypothecate the vessel, and also to bind himself and the owners, personally, for repairs and supplies, and that he does so without any express hypothecation, when, in a case of necessity, he obtains them on the credit of the vessel without a bottomry bond.⁴

But the limitation of the authority of the master to cases of necessity, not only of repairs and supplies, but of credit to obtain them, and the requirement that the lender or furnisher should see to it, that, apparently, such a case of necessity exists, are as ancient and well established as the authority itself.⁵

To constitute a case of apparent necessity, not only must the repairs and supplies be needful, but it must be apparently necessary for the master to have a credit to procure them. If the master has funds of his own, which he ought to apply to purchase the supplies which he is bound by the contract of hiring to furnish himself; and if he has funds of the owners, which he ought to apply to pay for the repairs, then no case of actual necessity to have

¹ The *Vibilia*, 1 W. Rob. 1; The *Rhadamanthe*, 1 Dod. 201; The *Hero*, 2 Dod. 139; The *Kenmersley Castle*, 3 Hag. 1.

² 96 U. S. 645.

³ 19 How. 22.

⁴ The ship *General Smith*, 4 Wheat. 488; *Peyroux v. Howard*, 7 Peters, 324, 341; The *Virgin*, 8 Peters, 538; The *Nestor*, 1 Story, 73; The *Chusan*, 2 Story,

455; The *Phoebe*, Ware's R. 263; *Davis v. Child*, Davis' R. 12, 71; The *William and Emline*, 1 Blatch. & H. 66; *Davis v. A New Brig*, Gilpin's R. 487; *Sarchet v. The Davis*, Crabbe's R. 185.

⁵ D. 14, 1, 7; *Consulat del Mare*, ch. 107; *Valin*, art. 19; *Emerigon*, *Con. à la Grope*, ch. 4, s. 8; *Boulay-Paty Cours de Droit Com.* tit. I. sec. 2; tit. IV. sec. 14.

a credit exists. And if the lender knows these facts, or has the means, by the use of due diligence, to ascertain them, then no case of apparent necessity exists to have a credit; and the act of the master in procuring a credit does not bind the interest of the general owners in the vessel.¹ On the application of these principles to the facts in the case of *The Barque Laura*,² the claim of the lender was not sustained, as he knew that the master had sufficient funds for the necessary supplies and repairs of the vessel.

The vessel under the maritime law in the United States is not subject to a lien for a common debt of the master or owner. To sustain such a lien for supplies or repairs, there must be the same case of pressing necessity, as would, for the like purpose, justify a loan of money on bottomry. The supply must be not only really or apparently necessary at the time it is furnished, but the burden of proof is on the libellant to show that there was also a necessity, at the time of procuring the supplies, for a credit upon the vessel. This proof is as essential as that of the necessity of the article itself.³

The mere fact of the master being owner, of itself, does not exclude the possibility of a case of necessity that would justify an implied hypothecation; but it is, undoubtedly, a circumstance that should be attended to in ascertaining whether any such necessity existed in the particular case.⁴

The following principles were laid down by the Supreme Court of the United States in *The Grapeshot*,⁵ and approved and followed in *The Guy*:⁶ 1. Liens for repairs and supplies, whether implied or expressed, can be enforced in admiralty only upon proof made by the creditor that the repairs or supplies were necessary, or believed, upon due inquiry and credible representation, to be necessary. 2. Where proof is made of necessity for the repairs or supplies, or for funds raised to pay for them by the master, and of credit given to the ship, a presumption will arise, conclusive in the absence of evidence to the contrary, of necessity for credit. 3. Necessity for repairs and supplies is proved where such circumstances of exigency are shown as would induce a prudent owner, if present, to order them, or to provide funds for the cost of them on the security of the ship. 4. The ordering, by the master, of supplies or repairs upon the credit of the ship, is

¹ *The Barque Laura*, *Thomas v. Osborn*, 19 How. 22.

² *Ibid.*

³ *The Steamboat Sultana*, *Pratt v. Reed*, 19 How. 359.

⁴ *The Sophie*, 1 Wm. Rob. 369.

⁵ 9 Wall. 129, 141.

⁶ 9 Wall. 758. And see *The General Smith*, 4 Wheat. 443; *Peyroux v. Howard*, 7 Pet. 324; *Brig Nestor*, 1 Sumn. 73; *The Fortitude*, 3 Sumn. 232, 246; *Pratt v. Reed*, 19 How. 359; *Thomas v. Osborn*, 19 How. 29; *The Aurora*, 1 Wheat. 96, 105; *The Virgin*, 8 Peters, 555.

sufficient proof of such necessity to support an implied hypothecation in favor of the material-man, or of the ordinary lender of money to meet the wants of the ship, who acts in good faith.

5. To support hypothecation by bottomry, evidence of actual necessity for repairs and supplies is required; and, if the fact of necessity be left unproved, evidence is also required of due inquiry and of reasonable grounds of belief that the necessity was real and exigent.¹

The presumption of law always is, in the absence of fraud or collusion, that where advances are made to a captain in a foreign port, upon his request, to pay for necessary repairs or supplies to enable his vessel to prosecute her voyage, or to pay harbor dues, or for pilotage, towage, and like services rendered to the vessel, that they are made upon the credit of the vessel as well as upon that of the owners. It is not necessary to the existence of the hypothecation that there should be in terms any express pledge of the vessel, or any stipulation that the credit shall be given on her account. The presumption arises that such is the fact from the necessities of the vessel and the position of the parties considered with reference to the motives which generally govern the conduct of individuals. Moneys are not unusually loaned

¹ In the case of *The Amelie*, 6 Wall. 18 (see the facts as stated *ante*, 249), it was insisted that even if the circumstances connected with the sale of the vessel by the master were such as to justify the sale and pass a valid title to the purchaser, he, nevertheless, took the title subject to all existing liens. The Supreme Court, in holding otherwise, said: "If this position were sound, it would materially affect the interests of commerce; for, as exigencies are constantly arising, requiring the master to terminate the voyage as hopeless, and sell the property in his charge for the highest price he can get, would any man of common prudence buy a ship sold under such circumstances, if he took the title encumbered with secret liens, about which, in the great majority of cases, he could not have the opportunity of learning anything? The ground on which the right to sell rests is, that in case of disaster, the master, from necessity, becomes the agent of all the parties in interest, and is bound to do the best for them that he can, in the condition in which he is placed, and, therefore, has the power to dispose of the property for their benefit. When nothing better can be done for the interest of those concerned in the property than to sell, it is a case of necessity, and as the master acts for all, and is the agent of all, he sells as well for the lien-holder as the owner. The very object of the sale, ac-

cording to the uniform current of the decisions, is to save something for the benefit of all concerned, and if this is so, the proceeds of the ship, necessarily, by operation of law, stand in place of the ship. If the ship can only be sold in case of necessity, where the good faith of the master is unquestioned, and if it be the purpose of the sale to save something for the parties in interest, does not sound policy require a clean title to be given the purchaser in order that the property may bring its full value? If the sale is impeached, the law imposes on the purchaser the burden of showing the necessity for it, and this he is in a position to do, because the facts which constitute the legal necessity are within his reach; but he cannot know, nor be expected to know, in the exercise of reasonable diligence, the nature and extent of the liens that have attached to the vessel. Without pursuing the subject further, we are clearly of the opinion, when the ship is lawfully sold, the purchaser takes an absolute title divested of all liens, and that the liens are transferred to the proceeds of the ship, which, in the sense of the admiralty law, become the substitute for the ship." See, further as to the liability of the vessel, *in rem*, for necessities and repairs, affirming the holding in *The Grapeshot*, 9 Wall. 129; *The Lulu*, 10 Wall. 192; *The Kalorama*, *Ib.* 204; *The Custer*, *Ib.* 215.

to strangers, residents of distant and foreign countries, without security, and it would be a violent presumption to suppose that any such course was adopted when ample security in the vessel was lying before the parties. The presumption, therefore, that advances in such cases are made upon the credit of the vessel, is not repelled by any loose and uncertain testimony as to the suppositions or understandings of one of the parties. It can be repelled only by clear and satisfactory proof that the master was in possession of funds applicable to the expenses, or of a credit of his own, or of the owners of his vessel, upon which funds could be raised by the exercise of reasonable diligence, and that the possession of such funds or credit was known to the party making the advances, or could readily have been ascertained by proper inquiry. Acting on these principles it was held in *The Emily Souder*,¹ that drafts for such expenses were only conditional payment, and, on their non-payment, a lien on the vessel could be enforced.²

In *The Ship Virgin*³ the following principles were decided by the Supreme Court of the United States: 1. A bottomry bond may be good in part and bad in part, and will be upheld by a court of admiralty to the extent to which it is valid. 2. If the supplies and advances were necessary for the vessel, it is incumbent on the owner to prove they could have been obtained on his personal credit. 3. The non-existence of funds, and the inability of the master to get at them, are equally valid causes for a bottomry. 4. A bottomry bond, given by the master after the advances had all been made, is valid, providing they were made with an understanding that such a bond would be given. 5. If the master changes his voyage, without any participation or fraudulent intent of the bottomry lender, the security is not thereby invalidated. 6. If the owner receives the vessel, upon a stipulation to pay into court its appraised value, with interest and costs, he cannot insist on allowances because he has discharged liens for seamen's wages; and if much delay has intervened, of which he has had the benefit, he must pay interest. 7. A bottomry bond does not make the owners, personally, debtors.⁴

The master of a Danish vessel being without funds and credit at Hamburg, in order to obtain necessities to enable his vessel to proceed on a voyage to Africa and back to London, obtained a loan on the security of instruments by which he pledged his ves-

¹ 17 Wall. 666.

² See *The Grapeshot*, 9 Wall. 129; *The Lulu*, 10 Wall. 192; *The Kalorama*, 10 Wall. 204; *The Patapsco*, 13 Wall. 329; *The Kimball*, 3 Wall. 37; *The Bark Chusan*, 2 Story, 456.

³ 8 Peters, 538.

⁴ On these points, see *The Tartar*, 1 Hagg. Ad. 1, 13; *The Elpis*, L. R. 4 Ad. & Ec. 1; *The Indomitable*, Swab. 446; *The Nelson*, 1 Hagg. Ad. 169, 179.

sel and bound himself for the repayment of the sum advanced, within six days after the arrival of the vessel in London. No stipulation was made for interest of any kind. Held in an action of bottomry instituted in admiralty against the vessel, that the instruments were valid bottomry bonds, and that the holders were entitled to payment out of the proceeds of the vessel, of the sum advanced, together with four per cent interest from the time when the bonds became due.¹

In an action on a bottomry bond granted at a foreign port on ship, cargo, and freight, the owners of the cargo pleaded that the master might have communicated with them before hypothecating the cargo, and that he had neglected to do so. The plaintiffs in reply alleged that the ship was an Italian ship, and that by the law of Italy such communication was not necessary. The court held, on demurrer, that the reply was bad in law; that communication by the master with the cargo-owners, if reasonably practicable, was necessary to constitute an agency and to enable him to hypothecate the cargo; that the general maritime law as administered in England was to be applied, and not the *lex loci contractus*, nor the law of the ship's flag.² On appeal, the Court of Appeal reversed the decision of the court below, and held that the owner of cargo who ships it in on board a foreign vessel, ships it to be dealt with by the master according to the law of the flag, that is, the law of the country to which the vessel belongs, unless that authority be limited by express stipulation at the time of the shipment. Therefore a bond, made by the master of a foreign ship hypothecating cargo laden on board such ship, if valid according to the law of the flag of the ship, will be enforced by the English Admiralty court, on the arrest of the ship and cargo at the port of London (the port of discharge within the meaning of the bond), although the conditions imposed by English law as essential to the validity of such bond have not been complied with.³

In *The Pontida*,⁴ it was decided that to constitute a valid bottomry bond the money must be required for the necessities of the ship, and the authority of the master to borrow money on bottomry is based on such necessity. Reasonable inquiries by a lender may be evidence of his *bona fides*, but will not make a bond valid in respect of the several items for which it is given to

¹ *The Cecile*, L. R. 4 Pr. Div. 210. See *The Elpis*, L. R. 4 Ad. & Ec. 1.

² *The Baetano and Maria*, L. R. 7 Pr. Div. 1.

³ *The Baetano and Maria*, L. R. 7 Pr. Div. 137. See *The Hamburgh*, Br. & L. 253; *Kleinwort v. The Cassa Maritima of Genoa*, 2 App. Cas. 156; *Lloyd v.*

Guibert, L. R. 1 Q. B. 115; *Pope v. Nickerson*, 3 Story, 465; *The Gratitude*, 3 C. Rob. 240; *The Buonaparte*, 8 Moo. C. C. 459; *The Karnak*, L. R. 2 P. C. 505; *The Eliza Cornish*, 1 Spinks, 36; *The Halley*, L. R. 2 P. C. 193.

⁴ L. R. 9 Pr. Div. 102, 177.

the full extent of such items unless they are actually and entirely necessary. Bowen, L. J., in this case, said: "Shortly expressed, the rule of law is, that the master is only the agent to bind the cargo-owner in the hour of necessity, and his authority must be measured by this principle." And Brett, M. R., notwithstanding his expressions in *The Gaetano and Maria*,¹ which we have quoted,² said: "The rule that a bond, though valid, is so only to the extent to which money is needed for the actual necessities of the ship, is founded on the doctrine, that, by the law of England, the master has no authority to bind the shipowner or cargo-owner, except in case of necessity. The rule should be even more stringent as regards the cargo-owner, for the master does not take goods on board as his agent, *and is not his agent at all unless an overruling necessity arises during the voyage.*"³

A claim for necessities supplied to a ship does not take priority over a mortgage existing at the time the supplies were furnished, and the mortgagee in possession is not liable for necessities to the ship, unless the master, in ordering the necessities, was acting as the agent of the mortgagee.⁴ And in *The Scio*,⁵ it was held that mortgagees of a ship are entitled to payment in priority to material-men, who, at the time of supplying the materials, were not in such actual possession of the ship as to give them a possessory lien over her.⁶

Transactions between the owner and mortgagee of the vessel which might render the voyage illegal, cannot invalidate a bottomry bond given by the master to a *bonâ fide* lender, who has only to look to the facts that the ship is in distress; that the master has no credit, and that the money is required for necessary purposes.⁷

A County Court having admiralty jurisdiction has no greater jurisdiction in respect of a claim for necessities, than that possessed

¹ L. R. 7 Pr. Div. 145.

² See *supra*, p. 251, n.

³ See, also, as to what are and what are not necessities, *The Heinrich Bjorn*, L. R. 8 Pr. Div. 151, and 10 Pr. Div. 44; *The Riga*, 3 A. & E. 516; *The Perla*, Swab. 353; *The Alexander*, 1 W. Rob. 346, 361; *The Sophie*, 1 W. Rob. 368; *The Ocean*, 2 W. Rob. 268; *The Augusta*, 1 Dod. 283; *The Omri*, Lush. 154; *The Lochiel*, 2 W. Rob. 34; *The Ella A. Clark*, Br. & L. 32; *The Two Ellens*, L. R. 4 P. C. 161; *The Pacific*, Br. & L. 243; *The James Guy*, 1 Bened. 112; *The Kalorama*, 9 Wheat. 409. And see on the main point in the case, *The Lord Cochrane*, 2 W. Rob. 336; *The Rhoderick Dhu*, Swab. 177; *The Nelson*, 1 Hagg. 169;

The Albion, 1 Hagg. 333; *The Lord Cochrane*, 2 W. Rob. 320; *The Huntley*, Lush. 24; *The Zodiac*, 1 Hagg. 321; *The Tartar*, 1 Hagg. 1; *The Calypso*, 3 Hagg. 162; *Gunn v. Roberts*, L. R. 9 C. & P. 331.

⁴ *The Troubadour*, L. R. 1 Ad. & Ec. 302. See *The Pacific*, Br. & L. 243; *The Salacia*, Lush. 545; *Frost v. Oliver*, 2 E. & B. 301; *Hibbs v. Ross*, L. R. 1 Q. B. 534; *Mitcheson v. Oliver*, 5 E. & B. 419; *The Jonathan Goodhue*, Swab. 524.

⁵ L. R. 1 Ad. & Ec. 353.

⁶ *The Pacific*, Br. & L. 243; *Williams v. Allsup*, 10 C. B. N. s. 417.

⁷ *The Mary Ann*, L. R. 1 Ad. & Ec. 13. See *The Mary Ann*, L. R. 1 Ad. & Ec. 8, as to the master's lien taking precedence over the claim of the mortgagees.

by the Admiralty Division of the High Court, and, consequently, cannot entertain an action for necessities supplied to a British ship, the owners of which are domiciled in Great Britain.¹

A suit for necessities was instituted in the Swansea County Court, *in personam*, against the owners, unknown, of a foreign brig, which was, at the time of the institution of the suit, at Swansea. It becoming necessary to issue a commission to take evidence from abroad, which the County Court could not do, the cause was transferred to the Admiralty Court. It appeared that the claim of the plaintiffs was for money advanced by them to execute necessary repairs to the brig at a British port, and that the money was advanced on the security of an instrument by which the master pledged himself and vessel, and her owners, for the repayment of the money, except in case of the total loss of the vessel on her intended voyage. It was held that the claim was founded on bottomry; that the County Court had no jurisdiction to entertain such a claim; that, as the cause was transferred from the County Court to the Admiralty Court, the latter had no jurisdiction, either, to entertain the suit; and that it was not competent for the plaintiffs, upon the facts, to waive the instrument of bottomry and insist on their claim for necessities, because the claim for necessities must be considered to be merged in the instrument of bottomry.²

As the master, in obtaining extraordinary supplies, or in performing such an act as executing a bottomry bond for such supplies, is simply an agent of necessity; where the owner can be communicated with, the necessity for such agency, and therefore such agency itself, does not exist. It was, accordingly, held by the Privy Council, sustaining the judgment of the Court of Admiralty, that, before resorting to bottomry for raising necessary supplies, it is absolutely necessary, where practical, that notice should be given by the master to the owner of the vessel; and an allegation that such owner was insolvent is no excuse for not communicating with him, unless he has been judicially declared insolvent, and the ownership of the vessel has vested in his assignees, in which case such notice should then be given to them. And under such circumstances, notice to the mortgagee of the vessel would not suffice.³

The existence of the necessity which validates the hypotheca-

¹ *Allen v. Garbutt*, 6 Q. B. D. 165. See *The Dowse*, L. R. 3 Ad. & Ec. 135; *Everard v. Kendall*, L. R. 5 C. P. 423; *The Ella A. Clark*, Br. & L. 32.

² *The Elpis*, L. R. 4 Ad. & Ec. 1. See *The Indomitable*, Swab. 446; *Bray v. Bates*, 9 Met. 237.

³ *Barron v. Stewart*, *The "Panama,"* L. R. 2 P. C. 199; affirming the judgment of the Court of Admiralty, L. R. 2 Ad. & Ec. 390. See *The Bonaparte*, 8 Moo. P. C. 459; *The Cargo ex The Hamburg*, 2 Moo. P. C. N. s. 289.

tion of cargo by bottomry is to be ascertained by evidence in the usual manner; and the meaning of "necessity," in respect of hypothecation by the master, is analogous to its meaning in other parts of the law. It has been described as a high degree of need; a degree which arises when choice is to be made of one of several alternatives under the peril of severe loss if a wrong choice should be made. In the case of a voyage, it is probably correct to say that any alternative for the captain is better than total loss of the ship and cargo, and that he is under a necessity of choosing another alternative, if any should be possible; and in respect of bottomry, any combination of events which would prevent the completion of the voyage with profit, unless money should be obtained by bottomry, would raise the question whether there was need for bottomry in such high degree as to create a necessity.¹

In this case, the master of the vessel, chartered from Galveston, U. S., to Liverpool, received before sailing from the charterer various sums in part payment of the freight, and after taking on board a cargo, sailed for the port of destination. The vessel, having in the prosecution of her voyage met with bad weather and suffered damage, put into Bermuda, where the master incurred heavy expenses for repairs and supplies. The repairs were executed and the supplies furnished, without any promise of a bottomry bond; but the law of Bermuda giving a right of arrest of the ship to the creditors for the repairs and supplies, the master, to complete the voyage, having written to the agent of the owners of the ship and of the cargo, and not receiving any answer within the time an answer might have been returned, raised the funds necessary for the payment of such supplies, on bottomry of the ship, cargo, and freight. On a suit brought by the assignees of the bond, the owners of the ship not opposing, the Court of Admiralty² pronounced for the validity of the bond, so far as it regarded the ship, cargo, and freight, and the ship was thereupon sold, but produced a sum far less than sufficient to cover the sum due on the bond. The consignees of the cargo, who were also entitled to the freight, claimed to retain in their hands the amount of freight, with interest and insurance advanced by them in part-payment before the commencement of the voyage, and paid the freight, short of that amount, into court. The court below disallowed this abatement, and ordered the whole freight to be paid into court. On appeal, the judicial committee of the Privy Council held that, under the circumstances, the master was warranted in resorting to a bottomry bond, and that the necessity of the case warranted the hy-

¹ *Droege v. Suart*, The "Karnak,"
L. R. 2 P. C. 505.

² The *Karnak*, L. R. 2 Ad. & Ec. 289,
313.

pothection of the cargo as well as the ship and freight; but, as the latter was, by the agreement between the charterer and the master, in part paid in advance, the retention of the amount of such prepayment by the consignees of the cargo was upheld, as the master, by hypothecating the chartered freight, could give no right to more freight than the owner had a right to demand from the charterer.¹

A maritime lien does not arise in a contract to build a ship, or in a contract to furnish materials for that purpose. In respect to such contracts, it is competent for the States in this country to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement, if not inconsistent with the exclusive jurisdiction of the Admiralty courts.²

In *Hingston v. Wendt*,³ where expenditures were made for the purpose of saving the cargo of a stranded ship, under circumstances which would have justified the master to make them as an agent of necessity; the master put the plaintiff, a ship-agent, in possession of the ship and cargo, with authority from the master to do, as his agent, what was for the benefit of all concerned. The plaintiff did work and expended money in discharging the cargo, and brought it to a place of safety, where he retained possession of it. The expenditure by the plaintiff was not for the purpose of enabling the shipowner to perform his contract and to earn freight, but was an extraordinary expenditure for the purpose of saving the property at risk, namely, the cargo. It was held that the plaintiff had a lien on the cargo for his charges as against the owner, though such charges were incurred without authority from the owner, the defendant; he, however, only becoming the owner

¹ See, also, *Stephens v. Broomfield*; *The "Great Pacific,"* L. R. 2 Ad. & Ec. 381; and, on appeal, L. R. 2 P. C. 516, as to constructive total loss after a ship has been hypothecated to raise money for necessary repairs.

² *The Belfast*, 7 Wall. 645; *Sheppard v. Steele*, 43 N. Y. 55; *Ferran v. Hosford*, 54 Barb. 208. A party wishing to enforce such a lien may proceed *in rem* in the Admiralty, or he may bring a suit *in personam* in the same jurisdiction, or he may elect not to go into Admiralty at all, and may resort to his common-law remedy in the State courts, or in the Circuit Court of the United States, if he can make proper parties to give the latter court jurisdiction of the case. *Edwards v. Elliott*, 21 Wall. 532, 557. But State legislatures have no authority to create a maritime lien,

nor can they confer any jurisdiction upon a State court to enforce such a lien by a suit or proceeding *in rem*, as practised in the Admiralty courts. *The Belfast*, 7 Wall. 644; *The Moses Taylor*, 4 Wall. 411; *Hine v. Trevor*, *ibid.* 555. Common-law remedies are not applicable to enforce a maritime lien by a proceeding *in rem*, and, consequently, the original jurisdiction to enforce such a lien by that mode of proceeding is exclusive in the District courts. *Edwards v. Elliott*, 21 Wall. 532; 557; *Brookman v. Hamill*, 43 N. Y. 554; *The Josephine*, 39 N. Y. 19. See, also, *The Lottawanna*, 21 Wall. 558; where the whole question of the jurisdiction of the Admiralty courts is most elaborately examined in the opinion of the court, and in the dissenting judgment of Clifford, J.

³ 1 Q. B. D. 367.

by an assignment of the bill of lading, after the expense had been incurred. Although the judgment is given with some hesitation, there seems to be no reason to doubt its soundness.¹

The master may become, as he did in *Attwood v. Sellar*,² *ex necessitate* the agent of the shipper to transship the cargo, while he is, at the same time, the agent of the shipowner. In such a case, as representing antagonistic interests, questions of difficulty may arise as they did in *Attwood v. Sellar*, in which case it may be a matter, as between the conflicting interests represented by the master as agent of necessity of the shipper and shipowner, of great uncertainty as to the course the master should pursue in such an anomalous position.³

W. was the registered owner of certain shares in a ship, and had been entered on the register as managing owner. The defendant subsequently became the registered owner of other shares in the ship. The defendant was not aware in fact that W. was so registered as managing owner. W. sent the ship on a voyage without the defendant's knowledge, and contrary to the terms of an agreement made between them. The defendant did not participate in the adventure, and had previously informed W. that he did not intend to navigate the ship or take any part in her management. The plaintiffs supplied necessaries for the ship previous to such voyage, upon the order of W., without the knowledge or consent of the defendant. The plaintiffs, before supplying the goods, consulted the register, and found the defendant's name entered therein as part-owner of the ship. It was held, by Bowen, J., that the fact that the defendant had allowed the entry on the register describing W. as managing owner to remain unaltered, did not, *per se*, amount to a holding out of W. as his agent, so as to render the defendant liable for the necessaries supplied by the plaintiff, and that, inasmuch as W. had not, in fact, authority to bind the defendant, the plaintiffs could not recover against the defendant for such necessaries.⁴

The plaintiffs, in an action of necessaries against a foreign ship, having, at the request of the master, advanced money to pay wages to the crew, pilotage, towage, light and dock dues; for reporting the vessel, and for telegrams and postage, claimed to be paid these charges in priority to the claim of a bottomry bondholder who had advanced money on bottomry at the port of loading.

¹ See *Moran v. Jones*, 7 E. & B. 523; *Notara v. Henderson*, L. R. 5 Q. B. 346; 7 Q. B. 225. See, where the parties acted without authority, *Nicholson v. Chapman*, 2 H. Bl. 254; *Castellain v. Thompson*, 12 C. B. N. s. 105.

² 4 Q. B. Div. 342, 347.

³ See Maude & P. on Ship., p. 438; *Shipton v. Thornton*, 9 A. & E. 314.

⁴ *Frazer v. Cuthbertson*, 6 Q. B. Div. 93.

It was conceded that all these claims except for the dock dues; for reporting the vessel, and for telegrams, should have the priority claimed. The court held that dock dues come within the rule as to priority, but that the advances for reporting the vessel, for telegrams, and for postages, did not.¹

The statement of claim in an action of necessities *in rem* alleged that in November, 1874, the plaintiff had supplied to the owners of the vessel proceeded against certain stores necessary for her equipment; that in September, 1876, whilst the amount due in respect of the said stores was still unpaid, forty-three sixty-fourth shares in the vessel had been transferred to the defendant in the action with knowledge and notice of the plaintiff's claim; that the defendant became owner of the shares subject to such claim; that the value of the shares was increased by reason of the said equipment, and that the owners of the vessel had derived benefit therefrom. It was held in the Admiralty Division on demurrer, that the statement of claim showed no right of action in respect of the vessel as against the defendant.²

The master of a foreign vessel lying in the port of Quebec, being without funds and credit, by means of a bill of exchange drawn upon a firm of ship-brokers in London procured the advance of a sum of money for necessities for the ship. The bill of exchange was accepted and paid, but the acceptors, not having received the amount of the bill from the shipowners, instituted an action against the ship for the amount of the bill. It was held by Sir Robert Phillimore in the Admiralty Division, and affirmed by the Court of Appeal,³ following the cases of *The Omri*,⁴ and *The Wataga*,⁵ that the Court of Admiralty had jurisdiction to entertain an action in all cases of necessities supplied to any foreign ship or seagoing vessel, and to enforce payment thereof; and that it makes no distinction whether the necessities were furnished on personal credit or not.⁶

When a master makes sale of a foreign vessel which is justifiable by the circumstances of the case, a bill of sale is not necessary to transfer the title to the vessel. When the vessel is sold and delivered, the property changes, and no written instrument is needed to give effect to the title. The rule of the common law on this subject has not been altered by statute. The law of the United States which requires the register to be inserted in

¹ *The St. Lawrence*, L. R. 5 Pr. Div. 250. See *The William F. Safford*, Lush. 69.

² *The Anacoid*, L. R. 2 Pr. Div. 189. *The Two Ellens*, L. R. 4 P. C. 161, and *The Pieve Superiore*, L. R. 5 P. C. 482, are in accord.

³ *The Anna*, L. R. 1 Pr. Div. 253.

⁴ Lush. Adm. 154.

⁵ Swab. Adm. 165.

⁶ See also *The Ocean*, 2 W. Rob. 268; *The India*, 32 L. J. P. M. & A. 185; *The Ella A. Clark*, Br. & Lush. 32; *The Two Ellens*, L. R. 4 P. C. 161.

the bill of sale, applies only to the character and privileges of the vessel as an American ship. It has no application to a foreign vessel sold by the master by necessity.¹

In *The Cobequid Marine Insurance Co. v. Barteaux*,² the Privy Council held, reversing the judgment of the Supreme Court of Nova Scotia, that, although a master may under circumstances of stringent necessity effect the sale of the vessel so as thereby to affect the insurers; yet such power is jealously watched by the courts, and is rigorously confined to cases of extreme necessity, such as where the circumstances, after sufficient examination of the vessel's condition, after every exertion in the master's power, within the means at his disposal, to extricate her from peril, or to raise funds for her repair, leave him no alternative but to sell her as she is.³

Where drafts are fraudulently drawn on the owner of a vessel for pretended repairs, supplies, insurance, and commissions, although expressing on their face that they are "recoverable against the vessel, freight, and cargo," as they bind neither the owners nor the vessel, and the drawer of the drafts has no lien on the vessel which he or any one else can enforce in admiralty, *bond fide* holders of the drafts for value, while they are not affected, so far as their remedies against the parties to the drafts are concerned, by the fraudulent character of the transaction, have no more claim against the vessel, notwithstanding what is expressed on the face of the drafts, than their fraudulent assignors had.⁴

The master has a maritime lien on the ship for his expenditure for necessaries, even against a *bond fide* purchaser of the ship.⁵

¹ *The Amelie*, 6 Wall. 18; *Wendover v. Hogeboom*, 7 Johns. 308; *Sharp v. United States Ins. Co.*, 14 Johns. 201; *Weston v. Penniman*, 1 Mason, 306.

² L. R. 6 P. C. 319.

³ See *Remier v. Ringrove*, 6 Ex. 263; *Navone v. Haddon*, 9 C. B. 30.

⁴ *The Woodland*, 104 U. S. 180.

⁵ *The Ringdove*, 11 Pr. Div. 120; *The Feronia*, 2 A. & E. 65; *The Jenny Lind*, 3 A. & E. 529; *The Mary Anne*, 1 A. & E. 8; *The Fairport*, 10 Pr. Div. 13; *In re Rio Grande Do Sul Co.*, 5 Ch. Div. 282.

The master of a vessel when abroad is the agent of the owners, and has power to make contracts in relation to freight which are binding upon the owners. But when an owner is on hand, and is exclusively attending to the shipment of the cargo, he is not bound by the master's contract; but to relieve himself from liability he must show the fact that he was exclusively attending to the shipment of the cargo. In *Ward v. Green*, 6 Cow. 173, it was held

that it is not enough that one of the owners is on board as supercargo; and where this was the case, and the master of a general ship gave a receipt for a quantity of Spanish dollars for transportation without the knowledge of the owners, and which was not put in the freight list, the money being stolen on the voyage, it was held that the owners were liable. See *Boucher v. Lawson*, Cas. Temp. Hardw. 83, 183; *King v. Lenox*, 19 Johns. 236; *Walter v. Brewer*, 11 Mass. 99. For a case of enlarged agency to a master to sell and buy cargoes, see *Bicknell v. Smith*, 31 N. Y. 259. And for a case where the facts constituted the master agent both of the shipper to deliver the cargo and of the purchaser to receive it, see *Smith v. Davenport*, 34 Me. 520.

In *Eads v. The Steamboat H. D. Bacon*, 1 Newb. Ad. 274, it was held that the master when upon a voyage is the general agent of the owners, and as they are bound by his acts whilst acting as such agent

within the scope of his authority, he has power as the agent of his owners to use and employ at their expense every necessary means to save his sunken vessel. The owners of a fishing-vessel may hire men to navigate the vessel, and to fish, for account of the owners, on wages instead of shares; and if one of the owners act as master, and the others do not interfere in the management of the vessel, he will be deemed their agent, and such a contract made by him in his own name will inure to their use, and be binding on them. *Baker v. Corey*, 36 Mass. 496. The master is the owners' agent for all purposes coming within the scope of his authority during the voyage; but he does not thereby become authorized to pay claims against his owners which do not accrue during the time while he has charge of the vessel. His agency is but for a limited time, and he cannot extend it beyond the time prescribed by his principal. *Kelley v. Merrill*, 14 Me. 228.

If the owner charters his vessel to the master for a certain period, the master covenanting to victual and man her at his own cost, he is to be deemed the owner *pro hac vice*, and he, like any other charterer under similar circumstances, is alone responsible for supplies for the intended voyage. *Hallett v. Col. Ins. Co.*, 8 Johns. 272.

But where the transaction is not a positive chartering, but a letting of the vessel on shares, although the master engaged with the owners to provide the supplies at his own cost, the owners are still liable, unless the person from whom the supplies are purchased is aware of the arrangement. In the absence of any notice to the seller that the vessel was let on shares, or of an opportunity by reasonable care and caution to ascertain the fact, the case is the ordinary one of the master of a vessel buying necessary supplies for the voyage. *Kenzel v. Kirk*, 37 Barb. 113. And see *Ship Fortitude*, 3 Sumn. 228; *Patterson v. Chalmers*, 7 B. Mon. 595; *Pendleton v. Franklin*, 3 Seld. 508; *The Paragon*, 1 Ware, 322; *Hardy v. Sproul*, 29 Me. 258; *Provost v. Patchin*, 5 Seld. 235; *Saxton v. Read*, *Lalor's Sup.* to *Hill & Den.* 323; *Rich v. Coe*, *Cowp.* 636; *Webster v. Lechamp*, 4 B. & Ald. 252; *Arthur v. Schr. Casino*, 2 Story, 94.

The general principle is that when, by a contract of charter-party, the charterer takes possession and control of the vessel, and navigates her by his own master and crew, he alone is responsible for the acts of the master. *Reynolds v. Tappan*, 15 Mass. 370; *Taggard v. Loring*, 16 Mass. 336; *Thompson v. Snow*, 4 Greenl. 268; *Emery v. Hersey*, 4 Greenl. 407.

When the vessel is let by charter-party,

and the charterer victuals and mans, and has the entire control of the vessel, the charterer is substituted in the owner's place, and becomes owner *pro hac vice*. In such a case the shipper has a lien on the vessel for the execution of a contract by a bill of lading, entered into by the master, which may be enforced by process *in rem* in the Court of Admiralty, as well when the vessel is employed under a charter-party as when it is in the employment of the owner. The owner has his remedy against the charterer. *The Phebe*, 1 Ware, 263. And where the master is the charterer he is not the master of the owner at the time, but the master of the vessel, representing his own interest as charterer, and, being owner of the vessel *pro hac vice* by virtue of the charter-party, he is exclusively responsible for the supplies bought by him for the vessel. *Mott v. Ruckman*, 3 Blatchf. 71; *Fraser v. Marsh*, 13 East, 238; *Melver v. Humble*, 16 East, 169; *Reeve v. Davis*, 1 A. & E. 312; *Webb v. Pierce*, 1 Curt. C. C. 104.

In *The City of New York*, 3 Blatchf. 187, it was held that though the charterers of the vessel were to be deemed owners of her for the voyage, that the purser of the vessel, who was their agent, was competent to bind her for the necessary supply of coal bought for her at a foreign port, even though the person furnishing it knew of the charter, and knew that, according to its terms, the charterers were bound to furnish coal for the voyage. Upon any other rule the master or agent of a vessel in distress in a foreign port would oftentimes find himself unable to procure the necessities essential for his relief. The voyage might be broken up for want of supplies, or the vessel might go to decay in port for want of repairs. And where the charterers were not owners for the voyage, but hirers of the vessel to carry passengers and freight, and the general owners have the possession and navigation of her, the charter-party resting in covenant, and not in a letting of the vessel; and a steamer out of coal goes into a foreign port in distress for supplies, without which she could not perform her voyage, the coal, if procured by the master under such circumstances, is a charge upon the vessel, according to the settled maritime law. *Ibid.*

The original owners of a vessel are not liable to pay for any supplies furnished for the vessel after they have sold all their interest in the vessel, although neither the master nor the merchant furnishing the supplies has any knowledge of the sale. The obligation imposed on owners of vessels abroad to pay for the necessary supplies furnished to the master is founded on the principle that the master is for this

purpose their agent, and is authorized to bind them in this case, because the supplies are for their use and benefit, and without such supplies their vessel cannot proceed on her destined voyage. But when the owners have alienated all their interest in the vessel the master ceases to be their agent, and the supplies are not furnished for their use. When, therefore, necessary supplies are to be furnished for a vessel on her voyage, and from home, the merchant may furnish them on the credit of the vessel by taking a hypothecation, or on the credit of the master by his consent, or on the credit of all who are owners at the time the supplies are furnished, because they have the use and benefit of them. But the original owners are exempted from all obligations to pay for such supplies furnished after the sale, because they are no longer owners, nor interested in the vessel or voyage. *Hussey v. Allen*, 6 Mass. 163; *Westerdell v. Dale*, 7 T. R. 312.

In *Church v. The Marine Ins. Co.*, 1 Mason, 344, Story, J., expresses a strong doubt whether the master, even at a judicial sale, can purchase on his own account; but he is very clear that he cannot purchase for his own benefit at a sale which he has had any agency in directing. This doctrine was sustained in *Chamberlain v. Harrod*, 5 Greenl. 420, where it was held that the purchase of a ship in a foreign port by the master is generally to be considered as made for the benefit of the owners, if they elect so to regard it.

In *Brightman v. Eddy*, 97 Mass. 478, where a vessel was transferred by the master from American to British ownership, in anticipation of a plot for her capture; in an action by one of the owners against the master for conversion, the judge, on the trial, instructed the jury that if the master made the transfer under a controlling and extreme necessity, for the purpose of preserving the vessel for the interest of all concerned, he had authority to make it, and the action could not be maintained; but the Supreme Court of Massachusetts held that while the instruction, as a proposition of law, was correct, as the evidence went to show that there was no actual danger of capture or seizure, there was, therefore, no necessity to justify the transfer; and a new trial was granted.

In *Babcock v. Terry*, 97 Mass. 482, it was held that the master of a whaling ship has no right to sell the oil, nor to ship it to another market, in the absence of instructions from the owners, express or implied, unless under a power derived from a controlling necessity. The master of a ship has no such general authority by virtue of his employment; nor has a part-

owner, where he is not intrusted with the direction of the voyage. *Underwood v. Robertson*, 4 Camp. 138; *The Packet*, 3 Mason, 255; *Peters v. Ballistier*, 3 Pick. 495. The steward of a steamer was in the habit of purchasing daily supplies for her use. During the continuance of his employment he made a contract with the owners by which he bound himself to keep, for his own account, on board of the boat, a restaurant for the convenience of passengers, and at the same time to feed the officers and crew, about twenty in number; to provide servants for the boat, and to have all the washing of the linen of the boat properly done. This contract was never made public; and the plaintiff, who had been furnishing meat to the steamer, continued to do so without being aware of its existence. The court held, that as he had not given credit to the steward, and as he was justified, by the course of conduct of the owners, in believing that he was dealing with the boat, the owners and steamer were liable. *Grisel v. Steamer Olivia*, 6 La. Ann. 461.

The master of a ship has by law no authority to sell the cargo, unless in cases of absolute necessity. In case of shipwreck, without the power of transshipment; of capture, or other casualty interrupting the voyage; or where it becomes necessary to sell part of the cargo to enable the vessel to prosecute the voyage, and in like cases, the master becomes, of necessity, the authorized agent of the owners, freighters, and all concerned. And he has power to sell the goods which are damaged, or of a perishable nature; or if any other necessity exist for the sale; but not otherwise. But the mere possession of the goods, without any such authority, express or implied, gives the master no power, and his sale passes no title. *Stillman v. Hurd*, 10 Tex. 109; *Freeman v. The East India Co.*, 5 B. & Ald. 617. It is an established principle at common law that a possessor of personal chattels cannot transfer to another a greater right than he has himself. If he have neither property nor authority, his sale will be invalid. *Lickbarrow v. Mason*, 1 H. Blk. 360; *Bartop v. Hoare*, 1 Wils. 8; *Wilkinson v. King*, 2 Camp. 335.

It is the duty of the master, when his vessel is disabled in the course of the voyage, to procure another if he can, and take on the cargo. *Emerig.*, tom. 1, 427; *Wilson v. The Royal Ex. Ins. Co.*, 2 Camp. 623; *Scheffelin v. The New York Ins. Co.*, 9 Johns. 21. This duty arises from the character of agent for the owner of the cargo, which is cast upon him from the necessity of the case, and in that character he is bound to act for the best interest of

all concerned. His acts, in the execution of such a trust, and in relation to the property under his care, are valid and binding upon the property, except in cases where his power is limited by positive rules. Emerigon lays down this doctrine, and declares that if the ship be forced by necessity into a foreign port, the master becomes the agent of the owners of the cargo as well as of the ship, and he is bound to see to the preservation of the cargo, and to do whatever the circumstances of the case shall dictate to be for the best, and what it is to be presumed the owners would do if they were present. His character of master invests him with the care and responsibility of a general agent of the ship and cargo; and he would be very blamable if he left the cargo at a foreign port while he had it in his power to carry it by another vessel to the port of destination. Emerig., tom. 1, 429, 433. And the master has no right to sell the cargo at the port of necessity, and then put an end to the adventure, if he can hire another vessel to carry the cargo to its destined port. See *Miller v. Fletcher*, Doug. 231; *Plantamour v. Staples*, 1 T. R. 511, n.; *The Gratitude*, 3 C. Rob. 240; *Van Orneron v. Dorrick*, 2 Camp. 42; *Wilson v. Millar*, 2 Stark. 1.

And where a ship puts into an intermediate port in distress, and is condemned as unseaworthy, and it becomes necessary, for the transportation of the cargo saved to its destined port, to hire another ship; the cargo, on its arrival at the port of destination, is chargeable with the increase of freight, if any, arising from the charter of the new ship; that is, the extra freight beyond what the freight would have been under the original charter-party if the necessity of hiring another ship had not intervened. *Searle v. Scovell*, 4 Johns. Ch. 213; *Mumford v. The*

Commercial Ins. Co., 5 Johns. 262. Where goods were shipped at one port, consigned to particular individuals at another, and the vessel put into an intermediate port in distress, and the master transferred the goods to another vessel, but instead of taking a bill of lading for their delivery to the original consignees, took a bill for delivery to his own order, and by his directions the goods were delivered to a mercantile house different from the original consignees, who sold the same; the purchaser, notwithstanding that he paid a *bonâ fide* price for the goods, is liable for their value to the owner, the master with whom the goods were originally shipped having no authority to dispose of the goods, either by himself or his agents. *Everett v. Saltus*, 15 Wend. 474; *Everett v. Coffin*, 6 Wend. 603; *Freeman v. East India Co.*, 5 B. & Ald. 617; *Williams v. Merle*, 11 Wend. 80. See an elaborate judgment on the same question in *Saltus v. Everett*, 20 Wend. 267, and the English and American cases there cited.

See *Douglas v. Moody*, 9 Mass. 548, where the master, as agent of necessity, was held to have power, in case of the wrongful capture of his vessel, to act for the owners, freighters, insurers, and all concerned, at the common charge of all the interests involved. See *Phillips v. McCall*, 4 Wash. C. C. 141, as to the duty of the master and crew in case of capture, and as to the effect of such capture upon the relations existing between them and the owners. And see *The Yuba*, 4 Blatchf. 352, as to what are necessities for a vessel in distress for which a bottomry bond will be sustained; and *Weld v. Maxwell*, 4 Blatchf. 136, as to necessary purchases for a ship at a foreign port, as part of her equipments and appurtenances, so as to be exempt from duty.

BOOK II.

PART V.

CORPORATION SALES AND PURCHASES.

1. DIRECTORS' OF COMPANIES SALES, ETC.

It is among the rudiments of the law that the same person cannot act for himself, and, at the same time, with respect to the same matter, act as the agent of another whose interests are conflicting. Thus a person cannot be a purchaser of property and at the same time the agent of the vendor. The two positions impose different obligations, and their union would at once raise a conflict between interest and duty; and, "constituted as humanity is, in the majority of cases duty would be overborne in the struggle."¹

The law, therefore, will always condemn the transactions of a party on his own behalf when, in respect to the matter concerned, he is the agent of others, and will relieve against them whenever their enforcement is seasonably resisted.

Directors of corporations, and all persons who stand in a fiduciary relation to other parties, and are clothed with power to act for them, are subject to this rule. They are not permitted to occupy a position which will conflict with the interest of parties they represent and are bound to protect. They cannot, as agents or trustees, enter into or authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits of such contracts made with themselves as such agents or trustees. Hence all arrangements by directors of a railroad company to secure an undue advantage to themselves at its expense, by the formation of a new company as an auxiliary to the original one, with an understanding that they, or some of them, shall take stock in it, and then that valuable contracts shall be given to it, in the profits of which they, as stockholders in the new company, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors

¹ *Marsh v. Whitmore*, 21 Wall. 178, 183.

of the original company, and will be condemned whenever properly brought before the courts for consideration.¹

The defendants contracted with the plaintiffs for the purchase of 10,000 tons of iron rails, for delivery during the following nine months. The defendants became insolvent when drafts on them for \$54,000 were protested for non-payment. Their financial agents agreed to pay these drafts, if the plaintiffs would sign a release for the balance of the contract. This was done by the treasurer of the plaintiffs' company, by the authority of the president. In an action on the contract for the sale and purchase of the iron, the defendants relied on the release. The plaintiffs relied upon the release having been executed without authority. It appeared that the original contract for the sale of the iron was executed by the president, without the seal of the company, and there was no evidence of any resolution of the board of directors authorizing or approving the contract. The president was also superintendent of the company, and as such had power to make contracts; to buy and sell, etc. At a meeting of the directors, after the release had been given, the matter was discussed, but no definite action was taken in the matter until six months after, when this suit was brought. The court held that the release was a valid release.

(1) As the president had the authority, without any express resolution or ratification of the board of directors, to make the contract on which the suit was brought, it would seem that, not being under seal, a simple contract concerning the ordinary business of the company could be released by him: the same power which enabled him to make it being sufficient to enable him to release it, unless the power had been withdrawn. (2) The rule of law upon the subject of the disaffirmance or ratification of the acts of an agent required that if the company had the right to disaffirm it they should do it promptly, and, if after a reasonable time they did not so disaffirm it, a ratification would be presumed.² The board, when notified by their agents, not disaffirming the action at the time, but waiting, in fact, about two years after notice of the transaction, before passing an act or resolution of disaffirmance were guilty of laches; while, if the suit brought in the case could be considered a disaffirmance, it came too late, as it was commenced some six months after they had knowledge of the release.³

¹ *Wardell v. Railroad Company*, 113 U. S. 651; *Great Luxembourg Railway Co. v. Magnay*, 25 Beav. 586; *Benson v. Heathorn*, 1 Y. & C. C. C. 326; *Flint. & Co. Railway Co. v. Dewey*, 14 Mich. 477; *European & N. A. Ry. Co. v. Poor*, 59 Me. 277; *Drury v. Cross*, 7 Wall. 299.

² *Badger v. Badger*, 2 Wall. 87; *Harwood v. Railroad Co.* 17 Wall. 78; *Marsh*

v. Whitmore, 21 Wall. 178; *Vigers v. Pike*, 8 Cl. & Fin. 650; *Wentworth v. Lloyd*, 32 Beav. 467; *Follansbee v. Kilbeth*, 17 Ill. 522; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 592; *Gold Mining Co. v. National Bank*, 96 U. S. 640; *Law v. Cross*, 1 Black, 533.

³ *Indianapolis Rolling Mill v. St. Louis, & Co. Railroad*, 120 U. S. 256.

The directors of a company having assigned to one of their number the property of the company, the company being in embarrassed circumstances, and the transaction being subsequently ratified by the stockholders, the court held, on a bill filed to charge the defendant as a trustee, and to compel him to account for the property he had received and the profits he had made, that the fact that the assignment was made to one who, at the time, was a director of the corporation, was not in itself sufficient ground to set aside the contract, it being made to protect the interests of the company and without any fraudulent design on his part, and having been repeatedly ratified. In affirming the decree, the United States Supreme Court declared that a court of equity does not listen with much satisfaction to the complaints of a company that transactions were illegal, which had its approval, which were essential to its protection, and the benefits of which it had fully received. Complaints that its own directors exceeded their authority come with ill grace when the acts complained of alone preserved its existence.¹

¹ *Pneumatic Gas Co. v. Berry*, 113 U. S. 322.

In cases where the powers of the directors of a corporation are without limitation, and free from restraint, they are at liberty to exercise a very liberal discretion as to what disposition shall be made of the gains of the business of the corporation. Their power over them is absolute so long as they act in the exercise of an honest judgment. They may reserve of them whatever their judgment approves as necessary or judicious for repairs and improvements, and to meet contingencies, both present and prospective. And their determination in respect to these matters, if made in good faith and for honest ends, though the result may show that it was injudicious, is final, and not subject to judicial revision. They are competent to make any contract which may be necessary, or fit and proper, to enable the corporation to accomplish the purposes of its creation. The question of the expediency of making a contract which is within the capacity of the corporation, is committed absolutely to the judgment of its managers, by whom alone it can act; and so long as they keep within the power conferred upon the corporation, and act in good faith, with honest motives and for honest ends, their contracts are valid, and conclude the proprietors of the corporation. *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114; *Elkins v. Camden & Atl. R. R. Co.*, 36 N. J. Eq. 241.

Directors of a corporation will not be

allowed, under an arrangement with each other, to issue the bonds of the corporation, and then purchase them at less than their value; or, if the value of the bonds is in fact paid at the time, and the director then proceeds under such an arrangement to sell the bonds on his own private account, so as to realize a profit, he will be held to account for that profit to the creditor or stockholder of the corporation. It is, in fact, the money of the corporation, and not that of the director. It has been held that a stockholder may buy up claims against his corporation at a discount, and prove them up as a creditor at their par value; but directors, who occupy the position of trustees for the creditors and stockholders, will not be allowed to deal with each other in such a manner. Such transactions will not be sustained, although the parties may have acted in the best of faith. The rights of both creditors and stockholders will be protected against such bargains, and the trustee dealing with the trust funds, or contracting for those he represents, will not be allowed to advance his own interest by antagonizing the interests of those he represents. *Wildrig v. Newport Street Ry. Co.*, 82 Ky. 511. See *Longest's Adm. v. Tyler's Ex'or*, 1 Duv. (Ky.) 194; *Covington & L. R. Co. v. Bowler's Heirs*, 9 Bush (Ky.), 468. But there is no rule of law which prohibits a shareholder from dealing with the company or from suing or being sued by it. And it has been held that the president of a company has the right, with his own funds, to purchase

A stockholder must make a proper showing of wrongs which he has suffered, and also of efforts to obtain relief against them,

the company's notes and drafts, and, when he does so, to succeed to all the rights of the previous holders. *Beach v. Miller*, 2 Ill. App. 151. In *Harts v. Brown*, 77 Ill. 226, it is said: "We have never known it questioned, that a director or stockholder may trade with, borrow from, or loan money to the company of which he is a member, on the same terms and in like manner as other persons." The same doctrine is held in *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Buell v. Buckingham*, 16 Iowa, 285; *Whitwell v. Warner*, 20 Vt. 425; *Sargent v. Webster*, 13 Met. 497; *Haywood v. Pilgrim Soc.*, 21 Pick. 270; *Ellis v. Boston, H. & E. Ry. Co.*, 107 Mass. 1.

Directors are prohibited, when a corporation is insolvent and about to go into liquidation, from preferring debts due to themselves from the corporation, or from preferring debts in the payment of which they have a personal interest. A corporation, though insolvent, has the power to prefer creditors, but the relation which directors bear to the corporation as trustees of its assets is such as they cannot lawfully exercise such power for their personal advantage. *Koehler v. Black River Falls Co.*, 2 Black, 720; *Drury v. Cross*, 7 Wall. 299; *Bradley v. Farwell*, 1 Holmes (Cir. Ct.), 433; *Corbett v. Woodward*, 5 Sawy. (Cir. Ct.) 417, 419; *Richards v. Insurance Co.*, 43 N. H. 263; *Lippincott v. Carriage Co.*, 25 Fed. Rep. 586; *Duncomb v. Railroad Co.*, 88 N. Y. 1; *Hopkins' Appeal*, 90 Pa. 76; *Robins v. Embry*, 1 Sm. & M. 207; *Curran v. Arkansas*, 15 How. 304. In *Adams v. Kehler Milling Co.*, 35 Fed. Rep. 433, it was held, that if the directors of an insolvent corporation, in the distribution of its assets, pay a creditor in full, to the exclusion of others, the choice ought not to be influenced solely by relationship existing between the directors and the creditor so preferred, or by other considerations of a purely selfish nature. And a preference given by directors (the majority of whom being brothers of the deceased) to the estate of a deceased director and president of the company was declared illegal. In *Bundy v. Jackson*, 24 Fed. Rep. 628, it was held that although the president and cashier of a bank could not make a sale of the stock of the bank to themselves that would bind the bank, but that the directors might have sold them the stock; and when the bank elects to ratify the sale they made to themselves, the president and cashier will not be heard to set up their own illegal or unauthorized act to avoid their contract; nor will they be permit-

ted to allege that the sale and purchase were merely colorable, or to avoid a forfeiture of the bank's charter, or for any other deceptive or illegal purpose. For other cases of sales between corporations and directors see note to 35 Fed. Rep. 436.

A stockholder purchased stock with the knowledge that it was illegally issued, and with this knowledge voted for directors, and subsequently applied for a writ of *quo warranto* to the directors to show why they exercised the powers of the company. The court refused the application on the ground that he who has concurred in inducing a party to exercise an office cannot be heard on an application to turn him out of office. *Cole v. Dyer*, 29 Ga. 434. For cases of sales of stock where it was claimed that the sales were illegal as between the purchasers and the company, see the *Souther Life Ins. Co. v. Lanier*, 5 Florida, 110; *Vermont Central R. R. Co. v. Claves*, 21 Vt. 31; *Schma, & Co. R. R. Co. v. Rountree*, 7 Ala. 670; *Henry v. Vamilia, & Co. R. R. Co.* 17 Ohio, 190; *Chester Glass Co. v. Dewy*, 16 Mass. 94; *Minor v. Mechanic Bank*, 1 Pet. 46; *Zabriski v. The Cleveland, & Co. R.R. Co.* 23 How. 381.

A minority of the stockholders of a corporation may maintain a bill in equity, on behalf of themselves and the other stockholders, for conspiracy and fraud, whereby their interests have been sacrificed, against the corporation and its officers and others who participated in the fraud; but they will forfeit their right to equitable relief by unreasonable delay. *Peabody v. Flint*, 88 Mass. 52. See *Veazie v. Williams*, 3 Story, 610; *Nash v. Adams*, 10 Cush. 252; *Fuller v. Melrose*, 1 Allen, 166. In *Smith v. Poor*, 40 Me. 415, the plaintiff, being a member of a corporation, and having made a contract with it, brought an action against some of the directors, claiming compensation from them, for certain alleged fraudulent acts and votes, by reason of which he had been damaged in his various relations with the corporation. The court held that the directors of a corporation, being chosen by the votes of the corporators, are the agents of the corporation, and are responsible to it for official misconduct and fraud in the discharge of their duty, and are not liable to such action at the suit of stockholders. See *Franklin Fire Ins. Co. v. Jenkins*, 3 Wend. 130; *Smith v. Hurd*, 12 Met. 371; *Robinson v. Smith*, 3 Paige, 222; *Hersey v. Veazie*, 24 Me. 9; *Allen v. Curtis*, 26 Ct. 456; *Stetson v. Faxon*, 19 Pick. 155;

before a court of equity will interfere and set aside the transactions of a railway company or of its directors. It is not enough

Cunningham v. Pell, 5 Paige, 607; Hodson v. Copeland, 16 Me. 314.

Where a company used the invention of one of their directors without an express contract to pay for its use, it was held that an implied assumpsit for the value of the invention would lie. Deane v. Hodge, 35 Minn. 146. And a corporation has been held liable, upon an implied assumpsit, to pay the reasonable value of services rendered for the corporation by a director outside of his duties as director. Rogers v. Hastings & Dakota Ry. Co., 22 Minn. 25. But he could not, as director, aid by his vote in fixing the amount of such compensation, for in that case there would be a conflict of interests inconsistent with his official duty. Jones v. Morrison, 31 Minn. 140, 148. See Rider v. Union India Rubber Co., 5 Bosw. 85, 97; Gardner v. Butler, 30 N. J. Eq. 702; Marston v. Swett, 66 N. Y. 206, 212; Marsh v. Dodge, 4 Hun, 281. Purchases made by a corporation cannot afterwards be impeached by those who at the time of the purchase constituted a majority of the directors, where there is no impress of unfairness or characteristic of fraud about the transaction. Hill v. Nisbet, 100 Ind. 341; Kitchen v. St. Louis, &c. R. W. Co., 69 Mo. 225; Merriek v. Peru Coal Co., 61 Ill. 472; Bristol Milling Co. v. Probasco, 64 Ind. 406; Ward v. Polk, 70 Ind. 309. A company was held liable to a director for a loan to the corporation, although he was one of four directors present when the order was made for the issue of a note for the amount, the other three directors voting for the order, and there being no issue or charge of fraud, or want of good faith on the part of the director holding the note, with reference to his vote at the meeting of the directors, nor charge of fraud against the other directors. Leavitt v. Oxford & G. S. M. Co., 3 Utah, 265. See Buell v. Buckingham, 16 Iowa, 284; Hayward v. Pilgrim Soc., 21 Pick. 270; Smith v. Skeary, 47 Conn. 47; The United States R. S. Co. v. The Atlantic & G. W. R. R. Co., 34 Ohio, 450; Twin Lick Oil Co. v. Marbury, 91 U. S. 587. But a contract with a director, where there were but three directors, and he and one other, only, voted in favor of the contract, the contract was held invalid, Bennett v. St. Louis Car Roofing Co., 19 Mo. App. 349; for the director must establish his contract by proof that he dealt with other agents of the corporation who had power to act in the premises. If his own vote was essential to give life to the contract, then it cannot be upheld against the corporation.

Patrick v. Gas Co., 17 Mo. App. 462; Butts v. Wood, 37 N. Y. 318; Bennett v. St. Louis Car Roofing Co., 19 Mo. App. 349.

In Verplank v. Mercantile Ins. Co., 1 Edw. Ch. 84, it was held that the relation of *cestuis que trust* and trustees does not exist between stockholders of an incorporated company and the corporation itself; nor are they in the relative situation of partners; nor are the stockholders creditors of the company. The company is merely a creature of the law, — a politic and not a natural body. It is made up by the compact entered into by the stockholders, each of whom becomes a corporator identified with and forming a constituent part of the corporate body. When a corporation aggregate is formed, and the management and control of its officers are in the hands of directors, the latter become the agents and trustees of the corporators, and a relation is created between the stockholders and those directors, who, as trustees, become accountable for dereliction of duty and violation of trust. In Scott v. Depeyster, 1 Edw. Ch. 513, it was held that persons who become directors or managers of a corporation place themselves in the situation of trustees, and the relation of trustees and *cestuis que trust* is thereby created between them and the stockholders. The directors are obliged to take the same care and use the same diligence as factors and agents. They are answerable not only for their own fraud and gross negligence, but also for all faults which are contrary to the care required of them. But in appointing subordinates, they do not become sureties for their fidelity or good behavior. If they select persons to fill such situations who are known to them to be unworthy of trust, or notoriously of bad character, and a loss by fraud or embezzlement ensues, in such a case a personal liability rests upon them, but not otherwise. They are not to be held personally liable, as between themselves and a stockholder, unless there has been negligence or fraud. See Harman v. Tappenden, 1 East, 555; The Attorney-General v. The Corporation of Exeter, 2 Russ. 45; Crooshanks v. Turner, 7 Bro. P. C. 255; Gray v. Chaplin, 2 Russ. 126; The Manhattan Bank v. Lydig, 4 Johns. 347. It is a well-settled principle of equity jurisprudence that a party holding a fiduciary relation to trust property cannot become the purchaser of such property, either directly or indirectly; and if he does, the sale is voidable, and will be set aside at the mere

that there may be a doubt as to the authority of the directors, or as to the wisdom of their proceedings. Grievances, real and sub-

pleasure of the beneficiaries, although such fiduciary may have paid a full price and gained no advantage. See *Newcomb v. Brooks*, 16 W. Va. 59, and cases there cited. This rule is not confined to trustees and fiduciaries in the technical sense of these terms, but it extends to every person coming within the reason of the rule. It embraces trustees, guardians, executors, administrators, agents, cashiers of banks, factors, auctioneers, sheriffs, commissioners in bankruptcy and their solicitors, assignees of bankrupts, attorneys-at-law, directors of corporations, and other parties between whom fiduciary relations exist. *Fox v. Macheth*, 2 Bro. C. C. 400; *Brothers v. Brothers*, 7 Ired. Eq. 150; *Patton v. Thompson*, 2 Jones Eq. (N. C.) 285; *Scott v. Freeland*, 7 Sm. & M. 417; *Davone v. Fanning*, 2 Johns. Ch. 252; *Newcomb v. Brooks*, 16 W. Va. 63. In *Abbott v. American Hard Rubber Co.*, 33 Barb. 578, a sale of the corporate property was set aside because directors of the company were interested in the purchase. The same rule as to purchasers of corporate property by directors has been applied in many cases. *Cumberland Coal Co. v. Sherman*, 30 Barb. 553; *Banks v. Judah*, 8 Conn. 145; *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456; *Aberdeen Ry. Co. v. Blaikie*, 1 McQueen, 461; *Robinson v. Smith*, 3 Paige, 222; *Percy v. Milladon*, 3 La. 568; *Hodges v. New England Screw Co.*, 1 R. I. 321; *Benson v. Hawthorne*, 6 Y. & C. 326; *The York & N. M. Ry. Co. v. Hudson*, 16 Beav. 485; *Sweeny v. Sugar Refining Co.*, 30 W. Va. 443.

The same rule does not generally apply to the stockholders of a corporation which is managed by a board of directors. Whether it does or not must depend upon the special facts of the particular case, — the general rule being that a stockholder of such corporation may purchase. But in cases where the stockholders assumed and performed the duties which ordinarily belong to a board of directors, it has been held that the usual disabilities of the directors attached to them. *Reilly v. Oglebay*, 25 W. Va. 36, 43. And see *Banks v. Judah*, 8 Conn. 145; *Moore v. Schoppert*, 22 W. Va. 282. But where the matter is entirely void of fraud, the purchase by a director can be ratified by the stockholders. *Cumberland Coal Co. v. Sherman*, 30 Barb. 553, 573. It is said in this case that the confirmation by the stockholders cannot be by a majority, but that, "to be complete, it must be the joint act of the whole body." But the

authorities cited for this proposition — *Ex parte Hughes*, 6 Ves. 622; *Ex parte Lacey*, 6 Ves. 628; *Ex parte James*, 8 Ves. 337; *Davoue v. Fanning*, 2 Johns. Ch. 264 — do not sustain it. While the relation between directors and stockholders is in some respects that of trustees and *cestuis que trust*, it is submitted that in one essential particular in this connection it is radically different. Thus, ordinarily, the act of one *cestui que trust*, like that of one of the co-owners of personal property, will not bind the other *cestuis que trust*, or the other co-owners, yet, as a general rule, in the absence of fraud and bad faith, the votes of a majority of stockholders, duly taken, bind their co-stockholders. See the *Northwest Transportation Co. v. Beatty*, 12 App. Cas. 589, 593 (stated *infra*, p. 306 *et seq.*), where the law is clearly laid down; and cases there cited. The mistake made in *Cumberland Coal Co. v. Sherman*, 30 Barb. 553, 573, is caused, we think, in confounding stockholders with ordinary *cestuis que trust*, whereas, as we have pointed out, there is a very marked distinction between the two. In *Flitcroft's Case*, 21 Ch. Div. 534, the distinction we take is sustained. There, properly, directors are designated "quasi trustees for the company." The same distinction is sustained in *In re Darham*, 25 Ch. Div. 752, 761, 763. The proper distinction is taken in *Gregory v. Patchett*, 33 Beav. 606, applicable to all cases where there is an absence of bad faith, that the power of the majority applies to all matters of their business, but not to matters beyond the powers of the company, nor to measures inconsistent with the object for which the company was constituted.

The case of the *New Orleans, &c. R. R. Co. v. Harris*, 27 Miss. 517, 537, accords with the holding in the English cases. The court there say: "Incorporated companies are subject to the same principle which prevails in the community at large, that the acts of the majority in cases within their charter powers are obligatory on the minority." The general rule on the subject is well expressed by Tilghman, C. J. He says: "The fundamental principle of every association for self-government is that no one shall be bound except with his own consent, expressed by himself or by his representatives; but actual assent is immaterial, the assent of the majority being the assent of all; and this is not only constructively but actually true; for that the will of the majority shall in all cases be taken as the will of the whole is an

stantial, must exist, and before an individual stockholder can be heard, he must show that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances or action in conformity to his wishes.¹

A corporation, organized and existing under the laws of Ohio, where it had its principal place of business, entered into a contract in Colorado, with the defendants, who were citizens of Colo-

implied, but an essential, stipulation in all associations of this sort. *St. Mary's Church*, 9 S. & R. 517. When the charter has made no provision on the subject, *this is unquestionably the rule in regard to all acts authorized by the fundamental law, performed in execution of the objects of the incorporation.*" An agreement was entered into by three persons owning the majority of the stock to elect the directors and control the affairs of the company. The agreement was sustained. *Faulds v. Yates*, 57 Ill. 416. The court said: "There was no fraud in the agreement, which has been so bitterly assailed in the argument. There was nothing unlawful in it; there was nothing which necessarily affected the rights and interests of the minority. Three persons owning a majority of the stock had the unquestioned right to combine, and thus secure the board of directors and the management of the property. Corporations are governed by the republican principle, *that the whole are bound by the acts of the majority when the acts conform to the law of their creation.*" The co-operation, then, of these parties in the election of the officers of the company, and their agreement not to buy or sell stock except for their joint benefit, cannot properly be characterized as dishonest and violative of the rights of others, and in contravention of public policy. If one man owned a majority of the stock he surely had the right to select the agents for its honest management." The same mistake that was made in *Cumberland Coal Co. v. Sherman*, 30 Barb. 553, 573, in treating directors as trustees instead of *quasi* trustees, is made by *Ritchie, C. J.*, in *Beatty v. North West Tr. Co.*, 12 Sup. Ct. of Can. R. 605 *et seq.* (stated *post*, p. 306 *et seq.*), the whole of whose judgment proceeds on the ground that directors and stockholders occupy the strictly relative position of trustees and *cestuis que trust*, which, as we have pointed out, is not accurate, directors being at the utmost but *quasi* trustees, and in their relation as mere stockholders to the other stockholders (the point which was involved in *Beatty v. North West Tr. Co.*, 12 Sup. Ct. of Can. R. 598) they are not even that.

On the other hand, as we have previously shown, it is an undisputed princi-

ple of law that directors and officers of corporations occupy a position of trust, and must act with the utmost good faith. They will not be allowed to deal with the corporate funds and property for their private gain. They have no right to deal with themselves and for the corporation at the same time, and they must account for the profits made by the use of the company's assets, and for moneys made by a breach of their duty. To that extent their position is very much the same as that of trustees. *Ward v. Davidson*, 89 Mo. 445; *Wondell v. Railroad*, 103 U. S. 651; *Keokuk Packet Co. v. Davidson*, 95 Mo. 467; *Attaway v. The Bank of St. Louis*, 93 Mo. 485; *Bliss v. Matterson*, 45 N. Y. 22; *Tobey v. Robinson*, 99 Ill. 233; *Copeland v. Johnson Manuf. Co.*, 47 Hun, 235; *Butts v. Wood*, 37 N. Y. 317; *Coleman v. Railroad*, 38 N. Y. 201; *Metropolitan R. R. Co. v. Manhattan R. R. Co.*, 11 Daly (N. Y.), 367, 492; *MacNaughton v. Osgood*, 41 Hun, 109; *Hoyle v. Plattsburgh R. R. Co.*, 54 N. Y. 314; *Blake v. Buffalo Creek R. R. Co.*, 56 N. Y. 486. But in *Branch v. Roberts*, 50 Barb. 435, it was held that neither stockholders nor creditors could sue directors for damages on the ground that stock or the obligations of the company became valueless by the misconduct of the directors. And see *MacNaughton v. Osgood*, 41 Hun, 109; *Brown v. Vandyke*, 8 N. J. Eq. 795. In *Gifford v. R. R. & Tr. Co.*, 10 N. J. Eq. 171, it was held that a court of equity will interfere on behalf of a single stockholder if he can show that the corporation are employing their statutory powers, funds, etc., for the accomplishment of purposes not within the scope of their institution, and an injunction in such cases will be granted; but that when acting within the scope and in obedience to the provisions of the constitution of the corporation, the will of the majority, duly expressed at a legally constituted assembly, must govern. See *Ward v. Soc. of Attorneys*, 1 Coll. 370; *March v. Eastern Railroad Co.*, 40 N. H. 548, as to the rights of minorities of the stockholders of a corporation.

¹ *Dimpfell v. Ohio & Mississippi Ry. Co.* 110 U. S. 209; *Hawes v. Oakland*, 104 U. S. 450.

rado, by which it was agreed that the plaintiffs should sell to the defendants, and deliver to them on the cars in Ohio, a steam-engine and other machinery, in consideration whereof the defendants were to pay the plaintiffs the price stipulated in the contract for such machinery. By Art. 15, sec. 10, of the constitution of Colorado, it is provided that "no foreign corporation shall do any business in this State without having one or more known places of business, and an authorized agent or agents in the same upon whom process may be served." By secs. 23 and 26 of an Act "to provide for the formation of corporations," passed in 1876, the legislature of Colorado enacted provisions to carry such clause of the constitution into effect. In an action brought to recover from the defendants damages for breach of the contract, they relied for their defence on the fact that this clause of the constitution and act of the legislature had not been complied with. On demurrer, the judges of the Circuit Court divided in opinion, and certified their division of opinion to the United States Supreme Court. The right of the people of a State to prescribe generally by its constitution and laws the terms upon which a foreign corporation shall be allowed to carry on its business in the State, has been settled.¹ And it was conceded that if the contract on which the suit was brought, was made in violation of a law of the State, it could not be enforced in any court sitting in the State charged with the interpretation and enforcement of its laws.² But the court held that the constitution and statute related to the regular and customary business operations of the corporation, and did not apply to a single transaction like the one in question.³

Bonds were given by a railway company to a construction company for work for the railway company, the payment of which bonds was resisted by the stockholders of the railway company, who charged that the bonds were fraudulently issued, two of the directors of the railway company being members of the construction company, and the construction company having agreed to release from their subscriptions for their stock, certain of the stockholders of the railway company, including all the directors, such subscriptions amounting to \$16,500 of the whole \$41,000

¹ *Bank of Augusta v. Earle*, 13 Pet. 519; *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 10 Wall. 410.

² *Bank of the United States v. Owens*, 2 Pet. 527; *Groves v. Slaughter*, 15 Pet. 448; *Harris v. Runnels*, 12 How. 79; *Brown v. Towkington*, 3 Wall. 377; *Davidson v. Lanier*, 4 Wall. 447; *Hananer v. Doane*, 12 Wall. 342; *Wheeler v. Russell*, 17 Mass. 258; *Law v. Hodson*, 11 East, 300; *Little v. Poole*, 9 B. & C. 192;

Thorne v. Travellers' Insurance Co., 80 Pa. St. 16; *Allen v. Hawks*, 13 Pick. 79, 82; *Roche v. Ladd*, 1 Allen, 436, 441; *In re Comstock*, 2 Saw. 218.

³ *Cooper Manufacturing Co. v. Ferguson*, 113 U. S. 727. And see *Utey v. The Clark-Gardner Mining Co.*, 4 Col. 369; *Potter v. The Bank of Ithaca*, 5 Hill, 490; *Snydam v. The Morris Canal and Banking Co.*, 6 Hill, 217; *Graham v. Hendrick*, 22 La. Ann. 523.

stock subscribed; which stock was worthless, and for which the individual stockholders were liable. The court held, that as the contract was fraudulent, it was voidable at the election of the parties affected by the fraud, and, on the stockholders repudiating the contract, the bonds were held void in the hands of parties who were not *bonâ fide* holders for value;¹ but that, although the original contract was fraudulent and "void," the construction company could recover against the railway company for the work, labor, and materials actually furnished to the latter, not as estimated by the prices named in the contract, but on a *quantum meruit*, for their real value to the railway company.²

A single stockholder in a corporation has, undoubtedly, the same right to institute legal proceedings against the corporation for the protection of his individual rights, that a third party, not a stockholder, possesses; but when he resorts to such proceedings to protect, not simply such interests, but the property and rights of the corporation, against the action or threatened action of third parties, thus assuming duties properly devolving upon its directors, he must show a clear breach of duty on their part in neglecting or refusing to act in the matter, amounting to such grossly culpable conduct as would lead to irremediable loss to him if he were not permitted to bring the matter before the courts. And such neglect and refusal must not be simulated, but real and persisted in, after earnest efforts to overcome it.³

¹ Thomas v. Brownville, &c. R. R. Co., 109 U. S. 522. See Twin Lick Oil Co. v. Marbury, 91 U. S. 587; Wardell v. The Union Pacific R. R. Co., 4 Dill. 339; 103 U. S. 651.

² See also Gardner v. Butler, 3 Stew. Eq. 702.

³ Detroit v. Dean, 106 U. S. 537; Hawes v. Oakland, 104 U. S. 450.

The managing committee of a corporation, which was organized pursuant to a statute, but which had not filed the articles of association with the county clerk, as the statute declared it was necessary to do before the corporation should commence business, entered into a contract for machinery with the plaintiff, which was furnished to the corporation and accepted by it. In a suit against the committee it was held, that, having disclosed their principals, they were not personally liable, but that the corporation, having ratified the contract by recognizing and treating it as valid, made the contract in all respects as it would have been if the requisite power had existed when it was entered into; the corporation having assumed, by entering into the contract with the plaintiff, to have the requisite power, both parties were

estopped from denying it. The restriction imposed by the statute was a simple inhibition. It did not declare that what was done should be void, nor was any penalty prescribed. No one but the State could object. The contract was valid as to the plaintiff, and he had no right to raise the question of its invalidity. Whitney v. Wyman, 101 U. S. 392; National Bank v. Matthews, 98 U. S. 621.

The question in National Bank v. Matthews, 98 U. S. 621, arose under the banking act (Rev. Stat. 1909, §§ 5136, 5137), prescribing the business of banks, and prohibiting the dealing by them in real estate except in exceptional cases. The act authorizes loans to be made "on personal security." Money was loaned on a promissory note, secured by a deed of trust to a third party on real estate, which was, in effect, a mortgage on real estate, with a power of sale. The United States Supreme Court followed the doctrine laid down in the First Nat. Bk., &c. v. Haire, 36 Iowa, 443, where it is said: "Every loan or discount by a bank is made in good faith, in reliance, by way of security, upon the real or personal property of the obligors; and unless the title by mort-

The president of a company purchased with his own funds, and with the knowledge and approval of the directors, the outstanding bond of the company. In an action by the assignee of the bond for the amount thereof against the company, the United States Supreme Court held, that the relation between the president and the company at the time of the transaction did not furnish any defence, either at law or in equity. The relation undoubtedly was one of a confidential and fiduciary character, but there was no ground to challenge the good faith with which the business was conducted. The bond of the company was purchased with the president's own means, and not those of the company; the value paid was full; and every step, when taken, was made known and assented to by the directors of the corporation. The transaction was legitimate in itself and beneficial to the company, and the dealing was not by the president with himself, but with the corporation, in fact, represented and acting by other directors, with full knowledge of all the facts.¹

In *Hotel Company v. Wade*,² where a bill was filed to foreclose a mortgage given to the plaintiffs to secure bonds issued by the defendants, a corporate body, it was claimed by the defendants that the bonds and mortgage were invalid, by reason of the trust relation which the lenders of the money, who were a majority of the board of directors of the company, sustained to the stockholders.³ The court below found that the bonds and mortgage were not void upon the ground that the lenders of the money were also the directors of the company; the terms of the contract having been sanctioned by the stockholders; the money loaned having been necessary to complete the company's building, and having been applied to effect the purpose for which it was borrowed. The United

gage or conveyance is taken to the bank directly, for its use, the case is not within the prohibition of the statute. The fact that the title or security may inure indirectly to the security and benefit of the bank will not vitiate the transaction." The utmost that can be said in favor of this view is that the strict letter of the statute is not contravened. There is, however, quite a number of cases in which a similar principle has been held in connection with analogous statutes. See *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Harris v. Runnels*, 12 How. 79; *The Planters' Bank v. Sharp*, 12 Miss. 75; *The Grand Gulf Bank v. Archer*, 16 Miss. 151; *Rock River Bank v. Sherwood*, 10 Wis. 230; *Mott v. The United States Trust Co.*, 19 Barb. 568; *Baird v. The Bank of Washington*, 11 S. & R. 411; *Potter v. McDowell*, 43 Mo. 93; *Watson v. Hawkins*, 60 Mo. 550; *Green v. Hart*, 1 Johns. 590;

Chappel v. Allen, 38 Mo. 213; *Shoemaker v. National Bank*, 2 Abb. (U. S.) 416; *Pittsburg Car Works v. Bank*, *Thomp. Nat. Bk. Cas.* 353; *Smith v. Sheely*, 12 Wall. 369; *Gold Mining Co. v. National Bk.*, 96 U. S. 640; *Steam Navigation Co. v. Wood*, 17 Barb. 380.

¹ *Manufacturing Company v. Bradley*, 105 U. S. 175.

² 97 U. S. 13.

³ See *Michod v. Girod*, 4 How. 503; *Koehler v. Black River Falls Iron Co.*, 2 Black. 715; *Drury v. Cross*, 7 Wall. 299; *Jackson v. Andeling*, 21 Wall. 616; *Stephen v. Beall*, 22 Wall. 329; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Luxemburg R. R. Co. v. Macquay*, 25 Beav. 586; *Cumberland Coal Co. v. Sherman*, 30 Barb. 553; *Railroad Company v. Poor*, 59 Mo. 277; *San Diego v. Railroad Company*, 41 Cal. 106; *Goodwin v. Railroad & Canal Co.*, 18 Ohio St. 182.

States Supreme Court affirmed the decree founded on this decision, saying: "Transactions of the kind have often occurred, and it has *never been held that the arrangement was invalid, where it appeared that the stockholders were properly consulted, and sanctioned what was done, either by their votes or silence.*"¹

The plaintiff, having borrowed money from the defendants, gave them stock as security for the loan, subsequently authorizing the bank to sell the stock at their discretion. The stock was then much depressed, ranging from \$15 to \$70 per share. Three of the directors, to protect the firm from loss, purchased the stock at \$87 per share, and received an assignment of it, purchasing it only on the condition that the plaintiff should be apprised of the transaction. The stock, at \$87 per share, just paid off the indebtedness of the plaintiff to the bank. The directors, after the purchase of the stock, paid all the assessments made on it, and received such dividends as were declared on it. Some four years after the transaction (the company, in the mean time, having consolidated its stock with that of another company, and the stock having become profitable) the plaintiff filed a bill to set aside the transaction. It was found that the plaintiff had been duly apprised of the purchase of the stock, by the directors, and, that if he did not expressly assent to what had been done, the most favorable construction for him which could be put upon the evidence was, that he was at least silent when notified of the proposition, and made no objection to its acceptance. The court held, that the facts presented insuperable obstacles to any decree in favor of the plaintiff. If the sale made by the bank was originally impeachable by him, the right to question its validity was lost by his acquiescence, as he was then in a condition, immediately after the sale, to enforce such rights as the law gave him, being, as he was, fully apprised of their nature, and of all the material facts of the case. He was held, also, to have lost by his laches any remedy which he might have had. So the case failed, both on the ground of acquiescence and of lapse of time.²

The director of a company which was in embarrassed circumstances, lent money to the company, taking a note therefor; to secure which a deed of trust of the property and franchises of the

¹ See *Stark v. Coffin*, 105 Mass. 328; *Imperial Merc. Credit Assoc. v. Coleman*, L. R. 6 Ch. 558; *Troup's Case*, 29 Beav. 353; *Hoare's Case*, 30 Beav. 225; *Smith v. Lansing*, 22 N. Y. 520; *Busby v. Finn*, 1 Ohio St. 409. See a rather remarkable case, *The North-West Transportation Co. v. Beatty*, L. R. 12 Ap. Cas. 589, stated *infra*, p. 306 *et seq.*

² *Hayward v. National Bank*, 96 U.

S. 611. See *Smith v. Clay*, Amb. 645; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Badger v. Badger*, 2 Wall. 87; *Marsh v. Whitmore*, 21 Wall. 178; *Harwood v. Railroad Co.*, 47 Wall. 79. In this last-named case it is said: "A party cannot be allowed to remain passive, prepared to affirm the transaction if the concern should prosper, or repudiate it if that should prove to his advantage."

company was made to a third party, with the usual power of sale. The property was sold under the power of sale; was bought in by the director's agent for the director, and was conveyed to him soon after. Four years after, the company filed a bill to invalidate the sale. There were charges of fraud, but the court expressed itself satisfied that the defendant had loaned the money to the corporation in good faith, and honestly, to assist it in its business in an hour of extreme embarrassment, and took just such security as any other man would have taken; that, when his money became due, and there was no apparent probability of the company paying it at any time, the property was sold by the trustee, and bought in by defendant at a fair and open sale, and at a reasonable price; that, in short, there was neither actual fraud nor oppression; no advantage was taken of defendant's position as director, or of any matter known to him at the time of sale, affecting the value of the property, which was not as well known to others interested as it was to himself, and that the only mode left the defendant to make his money was by the sale and purchase. The court accordingly held,¹ that while it is a doctrine founded on the strictest morality² that a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the subject-matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, are viewed with jealousy by the courts, and may be set aside on slight grounds; and that, while it was true that the defendant, as a director of the corporation, was bound by all those rules of conscientious fairness which courts of equity have imposed as the guides for dealing in such cases; it could not be maintained that any rule forbids one director among several from loaning money to the corporation, when the money is needed, and the transaction is open, and otherwise free from blame.

A doctrine to the contrary of this, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously, and best qualified to judge of the necessity of that aid, and of the extent to which it might safely be given. The decree of the Supreme Court of the District of Columbia, sustaining the transaction, was affirmed by the Supreme Court of the United States. The court also held that proceedings to set aside such a sale and purchase should be promptly taken. Those who seek to set it aside cannot delay, in order to speculate upon

¹ *Twin Lick Oil Company v. Marbury*, 91 U. S. 587.

² *Koehler v. Black River Falls Iron Co.* 2 Black, 715; *Drury v. Cross*, 7

Wall. 299; *Luxemburg R. R. Co. v. Maquay*, 25 Beav. 586; *The Cumberland Co. v. Sherman*, 30 Barb. 553; *Hoffman Co. v. Cumberland Co.*, 16 Md. 456.

the chances which the future may give them of deciding profitably to themselves whether they will abide by the bargain or rescind it. In order to exercise the right of rescinding or avoiding a contract or transaction, the necessary steps must be taken as soon as it can be reasonably done, after the party with whom that right is optional is aware of the facts which give him that option.¹

The *North-West Transportation Co. v. Beatty*,² is an extremely simple case. The singular feature about it is the almost ridiculous antagonism of the Canadian courts, in their various decisions in the case, over the simple question which it involves. The case starts with the admission all around that it is one entirely free of imputation of fraud or collusion, and that all suspicion of unfair dealing must be discarded. So the simple question resolves itself into this: Where a voidable contract, fair in its terms, and within the powers of the company, had been entered into by its directors with one of their number as sole vendor, has such vendor the right to exercise his voting power as a shareholder in a general meeting of shareholders to ratify such contract; and can his doing so be deemed oppressive by reason solely of his individually possessing a large number of votes, acquired in a manner authorized by the constitution of the company, and which, with the votes

¹ *Badger v. Badger*, 2 Wall. 87; *Harwood v. Railroad Co.*, 17 Wall. 78; *Marsh v. Whitman*, 21 Wall. 178; *Vigers v. Pike*, 8 Cl. & F. 650; *Wentworth v. Boyd*, 32 Beav. 467; *Follansbee v. Kilbreth*, 17 Ill. 522; *Bliss v. Edmonson*, 8 De G. M. & G. 787; *Prendergast v. Turton*, 1 You. & Coll. Ch. 98. In *Twin Lick Oil Co. v. Marbury*, 91 U.S. 587, 593, the court say: "The officers, and probably all the stockholders, who were not numerous, knew of the sale as soon as made. As there was no actual fraud, they knew all the facts on which their right to avoid the contract depended. They not only refused to join the defendant in the purchase when that privilege was tendered them, but they generally refused to pay assessments on their shares already made, which might have paid the debt. The defendant then had a survey made of the ground leased to the corporation, the lease being the main thing he had acquired by the sale. When the lines were extended, the lease was found to embrace a well, then profitably worked by another company. Of this piece of good luck he availed himself, and by suit and compromise he obtained possession of that well. He put more of his money into it, and changed what had been a disastrous speculation by the company into a profitable business. With full knowledge of all these

facts no action was taken until nearly four years after the sale; and not, until all the hazard was over, and the defendant's skill, energy, and money had made his purchase profitable, was any claim or assertion of right in the property made by the corporation, or by the stockholders." On this ground, also, the decree of the court below was affirmed.

A., who had covenanted with the supervisors of a county to construct a gaol, subject to the approval of a superintendent, who was authorized to stop the work if it and the materials furnished did not conform to certain plans and specifications, entered into a contract with B. to manufacture and erect in its proper position all the wrought-iron work for the gaol, according to such plans and specifications, but made no provision as to the approval of the superintendent. The court held that B. was entitled to recover on his contract the value of the work done and materials furnished by him, if he substantially complied with the plans and specifications, or if a strict compliance therewith had been waived by A., although the supervisors, in the exercise of their power under their contract with A., condemned B.'s work, and required A. to replace a portion of it. *Woodruff v. Hough*, 91 U. S. 596.

² 12 Ap. Cas. 589.

of those voting with him, constituted a majority of the votes of the shareholders? The Ontario Chancery Division¹ held (A. D. 1884), that without any regard "to the fairness or unfairness of the transaction," the shareholder, because he was a vendor, had no right to vote on the question at the meeting of the shareholders. The Ontario Court of Appeal (A. D. 1885) unanimously reversed this holding, on the ground, in effect, that the case being entirely free from imputation of fraud or collusion, there was no principle of equity to prevent the vendor exercising his rights as a shareholder and voting as a shareholder in favor of the purchase, although he had a personal interest in such purchase. The Supreme Court of Canada, on appeal (A. D. 1886), with singular and unaccustomed unanimity, but on the most varied and inconsistent grounds, — scarcely any two of the judges holding the same view in the matter, — unanimously reversed the decision of the Ontario Court of Appeal, and affirmed the decree of the Chancery Division. On appeal to the Privy Council (A. D. 1887), the decision of the Supreme Court of Canada was reversed and the decision of the Ontario Court of Appeal was sustained. Sir Richard Baggallay, in delivering the judgment of the Judicial Committee, thus referred to the well-known principles governing the case: "The general principles applicable to cases of this kind are well established. Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, and consequently upon the company, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject-matter opposed to, or different from, the general or particular interests of the company. On the other hand, a director of a company is precluded from dealing, on behalf of the company, with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect; and this rule is as applicable to the case of one of several directors as to a managing or sole director. Any such dealing or engagement may, however, be affirmed or adopted by the company, provided such affirmation or adoption is not brought about by unfair or improper means, and is not illegal or fraudulent or oppressive towards those shareholders who oppose it. . . . It is clear upon the authorities that the contract entered into by the directors could not have been enforced against

¹ 6 Ontario R. 300.

the company at the instance of the vendor, but it is equally clear that it was within the competency of the shareholders at their meeting to adopt or reject it.”¹

If an agent employed by a principal to purchase property for him sells to the principal property of his own, which he acquired before the agency existed, concealing from the principal the fact that it is his own property, the principal has a right, on discovering the real facts, to rescind the contract. But if he declines to rescind, or, with a knowledge of the facts, so acts with the property as to render rescission impossible, the principal is not entitled to call on the agent to account for the profit which he has made by the sale, i. e., either the difference between the price which he himself gave for the property and the price which he

¹ North West Transportation Co. v. Beatty, L. R. 12 Ap. Cas. at p. 593 *et seq.*

See Hotel Co. v. Wade, 97 U. S. 13; Twin Lick Oil Company, v. Marbury, 91 U. S. 587, and other cases, *supra*, in this Part. And see Mason v. Harris, 11 Ch. Div. 97; Smith v. Anderson, 11 Ch. Div. 274; Davidson v. Tulloch, 3 Macq. 783; Hayle v. Plattsburg & Montreal R. R. Co., 54 N. Y. 314; South Baptist Soc. of Albany v. Clapp, 18 Barb. 35; The Board of Commissioners, &c. v. Reynolds, 44 Ind. 409; Foster v. The Oxford, &c. R. Co., 13 C. B. 200; Cobb v. Goodhue, 11 Paige, 113. In Chesterfield, &c. Colliery Co. v. Black, 37 L. T. N. s. 740, Bacon, V. C., said: “That the directors of this company were in a fiduciary relation is plain beyond doubt. If, therefore, the sale, being made by two directors of the company to the company, were open to any suspicions of any of the misconduct which has happened in many such like cases, of course it could not stand. On the other hand, if that transaction was in itself fair; if there was no conduct on the part of the trustees which could mislead the *cestui que trust*; if every disclosure which the nature of the case required was made, then I know of no reason why the bargain is not as valid as if it had taken place between strangers.” See further McDougall v. Gardiner, 1 Ch. Div. 21; Gregory v. Patchett, 33 Beav. 605; *Ex parte* Moss, 14 Ch. Div. 394; Pender v. Lushington, 6 Ch. Div. 70; East Pant du United Lead Co. v. Merryweather, 2 H. & M. 254; *Re* Haven Gold Mg. Co., 20 Ch. Div. 151; Mozley v. Alston, 1 Ph. 790; Foss v. Harbottle, 2 Hare, 461; Gray v. Lewis, L. R. 8 Ch. 1035, 1051; Menier v. Hooper’s Telegraph Works, L. R. 9 Ch. 350; Lord v. Governor & Co. of Copper Miners, 2 Ph. 740; Stupert v. Arrowsmith, 3 Sm. & G. 176; Kent v.

Jackson, 2 De G. M. & G. 49; The London Merc. Discount Co., L. R. 1 Eq. 277; *Re* Hanen Gold Mining Co., 20 Ch. Div. 151. But it has been repeatedly laid down that thorough good faith is required on the part of directors in their transactions with their companies, and it is their duty to use their best exertions for the benefit of those whose interests are committed to their charge, and they are bound to disregard their own private interests whenever a regard to them conflicts with the proper discharge of such duty. *Imperial Merc. Credit Ass. v. Coleman*, L. R. 6 Ch. 563, n., *per* Malins, V. C.; *Ex parte* James, 8 Ves. 345; *Fawcett v. Whitehouse*, 1 Rus. & M. 132; *Hichens v. Congreve*, 1 Rus. & M. 150, n.; *Benson v. Heathorn*, 1 Y. & C. Ch. 326; *Beck v. Kanterwicz*, 3 K. & J. 230; *Aberdeen Ry. Co. v. Blaikie*, 1 Macq. 461; *Bank of London v. Tyrrell*, 27 Beav. 273; 10 H. L. Cas. 26; *Chaplin v. Young*, 33 Beav. 414.

Directors are under an obligation to the shareholders at large to use their best exertions in all matters which relate to the affairs of the company, for the welfare of the concern thus entrusted to their charge. And, without any special provision for the purpose, it is by law an implied and inherent term in the engagement, that they should not make any other profit to themselves of that trust or employment than their remuneration as directors, and that they shall not acquire to themselves, while they remain directors, an interest adverse to their duty. *Benson v. Heathorn*, 1 Y. & C. Ch. 326, 341. See *Gregory v. Patchett*, 33 Beav. 595; *Beman v. Rufford*, 1 Sim. N. s. 550; *Henry v. The Great Northern Ry. Co.*, 4 K. & J. 1; *Foss v. Harbottle*, 2 Hare, 461; *Mozley v. Alston*, 1 Ph. 790; *Norway v. Rowe*, 19 Ves. 144; *Prendergast v. Turton*, 1 Y. & C. Ch. 98; *Hoare’s Case*, 30 Beav. 225.

obtained from the principal, or the difference between the latter price and the market value of the property at the time of the sale to the principal.¹ The facts in this case were, that, in 1871, certain coal areas were purchased for £5,500 by six persons, of whom F. was one, and were vested in G. as a trustee for them without disclosing the trust. In 1873 a company was formed for the purpose of purchasing these areas and other property. F. was one of the directors, and as such he concurred in effecting a purchase by the company from G., for £12,000 cash, and £30,000 in fully paid-up shares, without disclosing the fact that F. was a part-owner. In 1875 the company was ordered to be wound up. In 1878 a meeting of contributories was called, at which two rival schemes were brought forward, one—a knowledge of the facts having, in the mean time, been obtained—for repudiating the purchase of the coal areas; the other for adopting the purchase and selling the property. The latter scheme was adopted, and was confirmed by the court. The liquidator accordingly sold the property, but at a heavy loss. A contributory then took out a summons, under the English Companies Act, to make F. liable for misfeasance as a director in allowing the company's seal to be affixed to the agreement for purchase by the company. Pearson, J., dismissed the summons. On appeal, the decision was sustained,² by Cotton and Fry, L. JJ., Bowen, L. J. dissenting. It was conceded that the right to apply under the Companies Act created no new rights, but only gave a summary mode of enforcing rights which existed independently of that act.³

¹ *In re Cape Breton Co.*, 26 Ch. D. 221.

² *Ibid.*, 29 Ch. D. 795.

³ The dissenting judgment of Bowen, L. J., is very ably reasoned; but, on the facts of the case to which the law is applicable, it is, we think, conclusively answered by Fry, L. J. As the point is an important one, and covers questions in principle in connection with the law of sales liable at any time to arise, and as the case is in some respects one of first instance, we quote at some length from the reasoning of Fry, L. J. He says: "This case is not the case of an agent who, after he has accepted the agency, has acquired property, the purchase of which was within the scope of his agency, and then has resold that property to his principal at a larger sum, in which case it is obvious that the principal may say that the original purchase by the agent at a smaller price was a purchase on behalf of the principal. Nor is this the case of a man who accepts an agency to buy some article in the market, and then sells to his principal

his own goods, in which case it may be that the agent is liable for not performing his agency by purchasing in the market, supposing it was possible for him so to do. This case is distinguished from that by there being a direction to buy a specific property. Nor, again, is this the case of an agent who, by any subsequent acts of his own, has rendered the rescission of the contract by his principal impossible. I express no opinion whether or no in that case the principal would have a right against the agent, notwithstanding the non-rescission of the contract. This is a case in which the agent, before accepting the agency, had an interest in the property, and during the agency sold that property to his principal without disclosing his interest. That in such a case the principal would have a right to rescind there can be no doubt. The option which the principal had in this case been exercised by confirming the contract with knowledge of the facts; and the question is whether, after that affirmation, the agent is liable in any sum to his prin-

The case was appealed to the House of Lords,¹ and the decision of the courts below was affirmed, but on entirely different grounds from those taken by either Pearson, J.,² or by the Court of Appeal.³ The House of Lords simply held that the appellant had failed to make out his case, the evidence adduced by him not showing (the burden of proof resting on him), either that the director had not disclosed his interest or that the purchase price was above the value. The case was fully dealt with in all its different aspects. As the respondent was interested in the property bought by the company of which he was a director, the House looked upon the matter as one of no doubt, that he was bound to disclose that interest to the other directors of the company who were entering into a contract for the purchase of the property, and that his failure to make that disclosure would entitle the company, upon discovering his interest, to rescind the sale. And

principal. There is no authority which determines this point, and it therefore is to be determined upon principle. Now, notwithstanding the very powerful criticisms of Lord Justice Bowen on the judgment of Mr. Justice Pearson, I think that judgment right. I think that the case is one in which the adoption of the contract by the principal puts an end, and ought to put an end, to any further rights against the agent. It appears to me that to allow the principal to affirm the contract, and after the affirmation to claim not only to retain the property, but to get the difference between the price at which it was bought and some other price, is, however you may state it, and however you may turn the proposition about, to enable the principal, against the will of his agent, to enter into a new contract with the agent, — a thing which is plainly impossible, or else it is an attempt on the part of the principal to confiscate the property of his agent on some ground which I confess I do not understand. It is said that, notwithstanding the ratification of the contract, the principal may claim some profits from the agent because those profits were made surreptitiously or clandestinely. It appears to me that the answer to that is this, that whatever the profits are, and however they are to be measured, those profits result, not from the original contract, but from the affirmation of the contract by the principal, and that, therefore, the profits which are made by the agent are neither clandestine nor surreptitious. I can conceive two possible claims being made. The one would be on the view that the profits were the difference between the purchasing and the selling price in the hands of the agent; but,

as has already been observed by Lord Justice Bowen, that cannot possibly be the measure of the claim of the principal, because at the date when the agent purchased he was not the agent of the principal, and the principal therefore had no right to go back to that date and fix it as the time at which he acquired a right to retain the property at the price paid for it by the agent. The other claim would be on the view that the profits were the difference between the real value, or the market value, if a market value exist, and the actual price at which the property was sold by the agent to the principal. I think the principal cannot claim that difference; because it appears to me that in such a case as this, where the principal had no right to claim the property as having been purchased on his behalf at a smaller price, the voluntary ratification of the purchase by the principal is equivalent for this purpose to a new sale by the agent to the principal after the relation between them had ceased, and that it is only in consequence of that ratification or adoption that any profits remain in the hands of the agent. In other words, therefore, I think it is not a case of profits made clandestinely or surreptitiously, because those profits have not arisen from the original transaction alone, but from the adoption of it by the principal. I think, therefore, that the decision of Mr. Justice Pearson was right, and that this appeal must be dismissed." *In re Cape Breton Co.*, 26 Ch. Div. 795, 811.

¹ *Cavendish Bentinck v. Fenn*, 12 App. Cas. 652.

² 26 Ch. Div. 221.

³ 29 Ch. Div. 795.

although rescission had become impossible, the House of Lords were clearly of the opinion that if it had been shown that there was a secret profit, improperly made by the respondent, the appellant would have had a remedy, under the 165th section of the Companies Act, for the loss which had been sustained by the alleged misfeasance of the respondent in failing to make the disclosure of the facts as to his position in connection with the property bought by the company.¹

¹ Lord Herschell thus dealt with the appellant's material contentions in the matter: "First, it is said to be a case of a secret profit made by an agent, which profit he is therefore bound to hand over to his principal. Of course it cannot be doubted that the respondent, as a director of the company, was in the position of an agent; and undoubtedly if he filled any fiduciary position towards them at the time when he purchased this property, he would be bound to pay to the company the difference between the price at which he purchased it and the price at which it was sold to the company. But here it is beyond question that at the time when the purchase was made, Mr. Fenn and his co-adventurers were none of them in any sort of fiduciary relation to the company, the existence of which at that time was not even contemplated. Again, there probably is little doubt that if an agent of a company is employed by that company to make a purchase for them in the market of goods of any description, and if instead of making that purchase in the market at the market price he sells to his company goods of the required description which he happens to own, at a price in excess of the market price, he can be made to pay to the company that excess, so as to leave their purchase, as it ought to have been, at the market price, according to the obligations which he is under to them. But, in the present case, the purchase that was made was a purchase of a specific property; it was that specific property alone which the agent, the director, was authorized to purchase. It was not left to him to purchase, at the best price at which they could be obtained, goods or land of a particular description; but his agency, so far as it existed at all, was an agency to purchase this specific property in which it is proved he had an interest. Now, I am by no means prepared to say that the argument of the appellant is well founded that such a case as this is a parallel case to the class of cases to which I have alluded, where an agent employed to go into the market and buy at the market price sells his own goods to the company at something above the market price. But

I do not think it is necessary to come to any absolute determination upon that point, because it is of the very essence of such a case as this to show that the price at which the property was sold to the company was in excess of what has been called the real price, or the true value. Now, what evidence is there here upon which your lordships would be entitled to act, that the property in question, when purchased by the company, was sold to them at a price in excess of the real value, or the market value, in whichever way you put it? I admit that there may be considerable ground for suspicion that the price was in excess of it. But obviously for such a case as the appellant seeks to make out here much more than that is necessary. It is of the very essence of the case, which rests upon his proving what he claims, namely, a secret profit improperly made, that he should prove that there has been that excess which he alleges." And on a full examination of the facts the conclusion was reached that there was not the slightest evidence to show that disclosure was not made, or that the other directors were not well aware of the respondent's position. All of the other lords were of the same opinion, both as to the failure of the evidence and as to the sufficiency of the remedy against the respondent, had the facts sustained the claim made, and had the claim been made by one entitled to the remedy. *Cavendish Bentinck v. Fenn*, 12 App. Cas. 652.

Lord Blackburn, in *McPherson v. Watt*, 3 App. Cas. 254, lays down the rule applicable to these cases thus: "The mere fact, therefore, that he does not disclose that he is a purchaser, or that he is interested in the purchase, in cases where the client might say, 'It was your duty to give me such advice,' gives the client a right, upon discovering the fact that the purchaser was, in whole or in part, the attorney whose duty it was to give him advice, to say, 'I have an option either to set the purchase aside if I please, or to let it stand if I prefer to do so.' He is entitled to say, 'This may be a very fair and proper bargain, but I do not choose to let it stand.'" But the relief which

The following are propositions relating to directors of a company, as laid down by Lord Romilly, M. R. : (1) Directors of a company issuing a prospectus are bound to disclose every material fact ; and, if they do not, they will be held liable to indemnify any person who takes shares from the company on the faith of the prospectus, against any loss which may be occasioned to him by reason of such concealment, even although they may have believed that the concealment will be beneficial to the persons induced to take the shares. (2) A fact which, if disclosed, would have so discredited the company as to prevent its formation, is a material fact within the meaning of the foregoing proposition. (3) The estate of a deceased director is liable in equity in respect of such indemnity, to the same extent as the director would have been if living. (4) A transferee of shares has no greater right to be indemnified by the directors in respect of their misconduct in issuing a prospectus than the original allottee would have had ;

the court will give is to rescind the contract, if the parties are willing to rescind it ; but the court will not, because the agent who sold to his principal, without informing him that he was really the seller, was in error in so doing, compel him to pay back to his principal the difference between the price at which he bought the property, it may be years before, and the price which he obtained for it from his principal. Nor will the court ascertain what was the market price of the property at the time of the sale to the principal, and say that the principal is entitled to recover back from his agent the difference between the sum which he paid him and that which the court ascertains to have been the market price at the time. *In re Cape Breton Co.*, 26 Ch. Div. 221, 229. The principle would be that the company were at liberty to treat the sellers as trustees of the property for the company, and, treating them as trustees, to allow them only what they paid for the property, and, if they got anything else out of the coffers of the company, to make them account for that. But in *In re Ambrose Lake Tin & Copper Manuf. Co.*, 14 Ch. Div. 390, it was held that neither on principle nor on authority can that be maintained, unless, at the time when the so-called vendor acquired the property, he either acquired it for the company, or was in such a position of fiduciary relation to the company that any purchase made by him of property available for the company must be considered as a purchase made by him as a trustee for the company. In that case, what the court does is to go back to the original purchase made by the person who afterwards purports to sell

to the company at an advanced price, and to say, 'This was already the company's at the price which you originally gave for it when you were a trustee for the company. That price you are entitled to receive out of the coffers of the company, and anything else is a sum paid to you for nothing, which you are not entitled to retain.' But neither on principle nor authority can the company, not seeking to set aside the transaction, say: "We will hold you as passing this to the company, not because you originally acquired it for the company, but because you entered into a contract to sell to the company which is not binding, and therefore we make another contract to take it from you for what it originally cost you, making you account for whatever else under that invalid contract you stipulated should be paid for it." See *In re National Funds Assoc. Co.*, 10 Ch. Div. 118; *Emma Silver Mining Co. v. Grant*, 11 Ch. Div. 918; 17 Ch. Div. 122; *In re Anglo-French Co-operative Soc.*, 21 Ch. Div. 492; *Erlanger v. New Sombrero Phosphate Co.*, 5 Ch. Div. 73; 3 App. Cas. 1218; *Murphy v. O'Shea*, 2 J. & Lat. 422; *McPherson v. Watt*, 3 App. Cas. 254; *Dunne v. English*, L. R. 18 Eq. 524; *Bagnall v. Carleton*, 6 Ch. Div. 371; *Lewis v. Hillman*, 3 H. L. Cas. 607; *Tyrell v. Bank of London*, 10 H. L. Cas. 26; *Rothschild v. Brookman*, 2 Dow. & C. 188; *Gillet v. Peppercorne*, 3 Beav. 78; *Robinson v. Mollett*, L. R. 7 H. L. 802; *Orgill's Case*, 21 L. T. N. s. 221; *Hay's Case*, L. R. 10 Ch. 593; *Gover's Case*, L. R. 20 Eq. 114; 1 Ch. Div. 182; *Handsworth v. City of Glasgow Bank*, 5 App. Cas. 317; *Clarke v. Dickson*, El. B. & E. 148.

and if the allottee would have been debarred of his remedy against the directors by laches, condonation, or otherwise, the transferee is also debarred of remedy. And (5) Any person seeking relief against directors of a company in respect of misconduct in issuing a prospectus, is bound to come promptly for relief.

All of these propositions are covered by the important case of *Peek v. Gurney*,¹ where Lord Romilly, M. R., delivers a most elaborate judgment. Here, in July, 1865, the directors of a company, formed to take over the business of a firm which they knew to be insolvent, issued a prospectus in which the fact of such insolvency was withheld from the public. If the fact had been disclosed, the company would not have been formed. The directors withheld the fact, honestly believing that the speculation on which they were about to embark would be successful. In October and December, 1865, the plaintiff, on the faith of the prospectus, bought in the market shares which had been originally allotted to a partner in the insolvent firm. In May, 1866, the company stopped payment, and was afterwards wound up, and the plaintiff, after considerable litigation, was settled on the list of contributories, and was compelled to pay large sums in respect of calls. In March, 1868, the plaintiff filed the bill in this suit, seeking to be indemnified by the surviving directors and the estate of a deceased director, in respect of his losses. It was held, that if he had been an original allottee, and had come in due time, he would have been entitled to such indemnity; but, that he was debarred of his remedy on the ground, first, that he was in no better position than the allottee from whom he bought; and, secondly, that he had come too late for relief.

The case came by appeal to the House of Lords,² and, although the decision of Lord Romilly, M. R., was affirmed, and the appeal dismissed, yet it was on grounds radically differing, in essential particulars, from those adopted by Lord Romilly. On the question of laches in connection with the proceedings instituted by the plaintiff, Lord Romilly dealt with the case upon the principle established by many decided cases, that an allottee or purchaser of shares in a company, who seeks to divest himself of his shares, upon the ground of his having been induced to purchase them by misrepresentation, cannot be relieved if he has continued to hold the shares without objection, after knowledge, or with the full means of knowledge, of the falsehood by which he has been drawn in to acquire them. These cases proceed upon the ground of acquiescence, and on the application of a more general principle that an agreement induced by fraud is not absolutely void, but that it

¹ L. R. 13 Eq. 79.

² *Peek v. Gurney*, L. R. 6 H. L. 377.

is entirely in the option of the person defrauded whether he will be bound by it or not. But the suit in the present case was not for the rescission of the contract, but was founded upon the loss the plaintiff sustained, and might sustain, in consequence of the contract he had entered into. And the House of Lords held that the doctrine of laches did not apply in this case as in the other; but that this was a proceeding similar to an action at law for deceit; and that the only amount of delay which could be a bar to relief was fixed by the statute of limitations, by analogy to which equity generally proceeds in questions of laches. And, although the order of Lord Romilly was sustained by the House of Lords, it was on an entirely different ground from the grounds relied on by the court below, although some of those grounds are recognized by the House of Lords. On the question of laches, the House of Lords held, that where a person became possessed of shares in October, 1865, and the company was ordered in June, 1866, to be wound up, and he contested his liability to be made a contributory, but was, in July, 1867, declared liable as such, and in March, 1868, filed his bill against the directors to be indemnified by them, the delay could not be set up as an answer to the suit.

The further holdings of the House of Lords in the case are:—

1. That a prospectus of an intended company ought not to misrepresent actual and material facts, or to conceal facts material to be known, the misrepresentation or concealment of which may improperly influence and mislead the mind of the reader, for if he is thereby deceived into becoming an allottee of shares, and, in consequence, suffers loss, he is entitled to proceed against those who had thus misled him. But the responsibility of directors who issue a prospectus for an intended company, misrepresenting actual and material facts, or concealing facts material to be known, does not, as of course, follow the shares on their transfer from an allottee to his vendee. In order that this third person, the vendee, should be enabled to maintain any proceeding at law, or in equity, against the directors, in respect of losses occasioned by his belief in the prospectus and his consequent procurement of shares, he must show some direct connection between them and himself in the communication of the prospectus, and its influence upon his conduct in becoming an allottee.

2. Where one of the projectors of a company, a partner of the old firm which sold its business to the company, set up as a defence that he had not taken part in preparing or issuing the prospectus, but he, knowing, however, all that the other directors knew, consented to become a director of the company, signed the memorandum and articles of the association, and shares were ap-

propriated to him : he could not, under these circumstances, avail himself of such a defence.

3. The proceeding in such a case is like an action at law for deceit (the same principle being applicable in such a matter, both at law and in equity), and is, therefore, of a personal character, and the estate of a deceased director, not being alleged and proved to have derived benefit from the deceit, his executors cannot be made liable to compensate the person who asserts that he has been injured by it.

4. The proper purpose of a prospectus of an intended company is to invite persons to become allottees of the shares, or original shareholders in the company, and when it has performed this office it is exhausted.

5. Although mere non-disclosure of facts, unless such non-disclosure has had the effect of making the disclosed facts absolutely false, would not be sufficient to sustain a proceeding which was really in the nature of an action for misrepresentation, yet where a prospectus for an intended company was prepared by the projectors (the directors of the company), and was issued by them to the public, which contained misrepresentations of facts, the facts being known to those who issued the prospectus; and it also concealed the existence of a deed which was material to be known, and which, if known, would in all probability have prevented the formation of the company; and, being addressed to the whole public, any one might take up the prospectus and appropriate to himself its representations, by applying for an allotment of shares; yet, as when the allotment was completed the office of the prospectus was exhausted, a person who had not become an allottee, but was only a subsequent purchaser of shares in the market, was not so connected with the prospectus as to render those who had issued it liable to indemnify him against the losses which he had suffered in consequence of the purchase.¹

¹ The duties of persons who issue a prospectus are thus laid down in *New Brunswick & Canada Railway Co. v. Mugeridge*, 1 Dr. & Sm. 363, 381: "Those who issue a prospectus, holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as inducements to take shares." This has been cited ap-

provingly in *Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99, 113; and in *Henderson v. Lacon*, L. R. 5 Eq. 249, 263. See *Oakes v. Turquand*, L. R. 2 H. L. 325. Lord Eldon said, in *Evans v. Bicknell*, 6 Ves. 174, 182, "It is a very old head of equity that if a representation is made to another person going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good if he knows it to be false." The principle of these cases was acted on in *Burrowes v. Lock*, 10 Ves. 470; *Slim v. Croucher*, 1 De G. F. & J. 518; *Colt v. Woollaston*, 2 P. Wms. 154; *Green v. Barrett*, 1 Sim. 45; *Crieland v. Lord De Manley*, 1 De G. & Sm. 459; *Ramshire v. Bolton*, L. R. 3 Eq. 294; *Hill v. Lane*, L. R. 11 Eq. 215; *Barry v. Croskey*,

In *The Overend Gurney Co. v. Gibb*,¹ it was held by the House of Lords, in sustaining a demurrer to a bill filed by the company against the directors : —

1. That facts which may show imprudence in the exercise of powers undoubtedly conferred upon directors, will not subject them to personal responsibility ; the imprudence must be so great and manifest as to amount to *crassa negligentia*, or malfeasance, which, to make the directors liable, must be distinctly charged.

2. In a company formed for the purchase of a business, where the power to make the purchase was distinctly conferred on the directors, though the character of the business turned out to be ruinous, unless that character was obviously apparent when the purchase was made, the directors will not be personally responsible for making it.

3. Where directors of a company act as in this case, rather as agents or mandatories, than trustees, and are authorized to do an

2 J. & H. 1, 30, in equity, although in these cases it was claimed that there was an adequate remedy at law for the plaintiffs.

In *Burnes v. Pennell*, 2 H. L. Cas. 497, it is laid down that it is the *suppressio veri* or the *suggestio falsi* which is the foundation of the right to relief in equity, and this exists whether it was fraudulently or mistakenly done. The super-added guilty intention gives the criminal jurisdiction, but this does not take away the equitable jurisdiction. A man may not have intended to deceive, and may have believed that he did not, when he was really suppressing the truth or suggesting what was false. If so he is not liable to an indictment in a criminal court, but he is equally responsible in equity as if he had while committing these acts done so with a view to injure others or to benefit himself. See *Bargate v. Shortridge*, 5 H. L. Cas. 297; *New Brunswick Land, &c. Co. v. Conybeare*, 9 H. L. Cas. 711; *Central Railway Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99, 110; *Cornfoot v. Fowke*, 6 M. & W. 358; *Fuller v. Wilson*, 3 Q. B. 53; *Evans v. Collins*, 3 Q. B. 78, n. ; 5 Q. B. 804; *Taylor v. Ashton*, 11 M. & W. 401; *Langridge v. Levy*, 2 M. & W. 519; 4 M. & W. 337; *Evans v. Bicknell*, 6 Ves. 171; *Pasley v. Freeman*, 3 T. R. 51; *Stainbank v. Fernley*, 9 Sim. 556; *Daniel v. Mitchell*, 1 Stov. 172; *Napier v. Elam*, 6 Yerg. 108; *Parkham v. Randolph*, 4 How. 435; *McAllister v. Barry*, 2 Hayw. 290; *Livingston v. Peru Iron Co.*, 2 Paige, 390; *United States Bank v. Lee*, 13 Peters, 107; *Burrows v. Lock*, 10 Ves. 470. In *Barry v. Croskey*, 2 J. & H. 1, 22, the principles applicable to such cases are stated as fol-

lows : *First*, every man must be held responsible for the consequences of a false representation made by him to another, upon which that other acts, and so acting is injured or damaged. *Secondly*, every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and so acting is injured or damaged, provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss. But, *thirdly*, to bring it within the principle, the injury must be the immediate and not the remote consequence of the representation thus made. To render a man responsible for the consequences of a false representation made by him to another, upon which a third person acts, and so acting is injured or damaged, it must appear that such false representation was made with the direct intent that it should be acted upon by such third person in the manner that occasions the injury or loss. See, further, *Keates v. Earl Cadogan*, 10 C. B. 591; *Scott v. Dixon*, 29 L. J. Ex. 62, n. ; *Gerhard v. Bates*, 2 E. & B. 476; *Cullen v. Thompson*, 4 Macq. Sc. Ap. 424; *The National Exchange Co. of Glasgow v. Drew*, 2 Macq. 103; *Ayre's Case*, 25 Beav. 513; *Ranger v. The Great Western Ry. Co.*, 5 H. L. Cas. 86; *Conybeare v. The New Brunswick, &c. Co.*, 1 De G. F. & J. 578; *Langridge v. Levy*, 2 M. & W. 519; *Evans v. Bicknell*, 6 Ves. 182; *Bedford v. Bagshaw*, 4 H. & N. 538; *Pasley v. Freeman*, 3 T. R. 51; *The Royal British Bank v. Nicol*, 5 Jur. n. s. 207.

¹ L. R. 5 H. L. 480.

act in itself imprudent, and one which the principal ought not, as a matter of prudence, to have authorized, the directors are not to be held responsible for the consequences resulting from doing the act which their principals authorized them to do.¹

Directors of a company were held liable for cheques signed or sanctioned by them, used for the purchase of shares in the company, where the articles of association empowered them "to buy, sell, or loan, on all descriptions of shares, including shares issued by the company,—not being speculative transactions for the rise and fall of shares;" where the transaction was of a speculative character.²

2. INCORPORATED COMPANIES AND MUNICIPAL CORPORATIONS.

As to Necessity of Company's Seal to Contracts.

The old doctrine that a corporation could not contract except under seal has been, in modern times, largely broken into.

It has been held in England, that whenever a corporation is created for particular purposes, which involve the necessity for frequently entering into contracts for goods or works essentially necessary for carrying on the purposes for which the corporation is created, into execution, a demand in respect to goods or works which have actually been supplied to and accepted by the corporation, and of which they had the full benefit, may be enforced by action of assumpsit, and the corporation will be liable, though the contract was by parol only and not by deed.³

¹ See *Turquand v. Marshall*, L. R. 4 Ch. 376; *Oakes v. Turquand*, L. R. 2 H. L. 326; *Vigers v. Pike*, 8 Cl. & F. 562; *Bovey v. Tracey*, 2 Eq. Cas. Ab. 163; *Corporation of Ludlow v. Greenhouse*, 1 Bli. N. S. 17; *Charitable Corporation v. Sutton*, 2 Atk. 400; *Attorney-General v. Wilson*, Cr. & P. 1, 28; *York & North Midland Ry. Co. v. Hudson*, 16 Beav. 485.

² *Land Credit Company of Ireland v. Lord Fermoy*, L. R. 8 Eq. 7. The court said: "Neither the memorandum nor the articles mention the purchase of shares of the company; and even if that could be implied in this case it must be with the restrictions mentioned that the purchase is not made for speculation. The payment was not justified by the rules and principles on which the company was founded. This being so, all the directors who made or sanctioned the payment are liable to refund it, or so much of it as they individually sanctioned. Directors are, so far as regards the employment of the funds of the company, trustees for the

shareholders, and are answerable to their *cestuis que trust* for the due employment of the funds entrusted to them. . . . A plea of ignorance by a director, or that anything was done by him for the sake of conformity, is merely a plea of guilty, and it is an admission of liability to account for the sums misapplied."

³ *Clarke v. Cuckfield Union*, 21 L. J. Q. B. 349; *Haigh v. North Brierley Union*, E. B. & E. 873; 28 L. J. Q. B. 62; *Sanders v. St. Neot's Union*, 8 Q. B. 810; *Paine v. The Strand Union*, *Id.* 326; *Church v. The Imperial Gas Light & Coke Co.*, 6 A. & E. 846; *De Grave v. The Mayor, &c. of Monmouth*, 4 C. & P. 111; *Beverley v. The Lincoln Gas Light & Coal Co.*, 6 A. & E. 829; *The Copper Miners Co. v. Fox*, 20 L. J. Q. B. 174; *Bac. Ab. tit. Corporations*, E; *Com. Dig. tit. Franchises*, F, 12, 13; *The London Gas Light & Coal Co. v. Nicholls*, 2 C. & P. 365; *The Mayor, &c. of Stafford v. Till*, 4 Bing. 75; *The East London Waterworks Co. v. Bailey*, 4 Bing. 283.

The case of *Clarke v. Cuckfield Union*,¹ was followed and approved in *Nicholson v. Bradford Union*,² where the plaintiffs supplied coal from time to time to the defendants, the guardians of a poor-law Union, for the use of their workhouse, under articles of agreement between the plaintiff and the defendants executed by the plaintiff, but not under the seal of the defendants. The defendants received and used some of the coals. In an action for goods sold and delivered it was held that, as the goods had been supplied and accepted by the defendants, and were such as must necessarily be from time to time supplied for the very purposes for which the defendants were incorporated, the defendants were liable to pay for the coals although the contract was not under seal. Lord Blackburn, in delivering the judgment of the court, refers to the important distinction between an action against a corporation where the contract is not under seal, where the contract is executory, where the corporation has not derived any benefit under the contract, and a case such as *Nicholson v. Bradford Union* where the contract has been executed and the corporation has received the full benefit of it.³

A company entering into a contract for the purchase of goods, and having power to do so, is bound by such contract, although the goods may not be intended to be used for the purposes of the company, and although this fact may be known to the person with whom

¹ 21 L. J. Q. B. 349.

² L. R. 1 Q. B. 620.

³ The following are the remarks of Lord Blackburn on the point involved: "It is not necessary to express any opinion as to what might have been the case if the plaintiff had been suing on this contract for a refusal to accept the coals, or any other breach of the contract whilst still executory, or how far the principle of *London Dock Company v. Sinnott*, 8 E. & B. 347, would then have applied to such a contract. The goods in the present case have actually been supplied to and accepted by the corporation; they were such as must necessarily be from time to time supplied for the very purposes for which the body was incorporated, and they were supplied under a contract, in fact, made by the managing body of the corporation. If the defendants had been an unincorporated body nothing would have remained but the duty to pay for them. We think that the body corporate cannot under such circumstances escape from fulfilling that duty merely because the contract was not under seal. The case of *Clarke v. Cuckfield Union*, 21 L. J. Q. B. 349, is in its facts undistinguishable from the present case. We are aware that very high au-

thorities have questioned the soundness of that decision, and, as pointed out in the judgment in that case, there are prior decisions in the Court of Exchequer which it is difficult to reconcile with it. We think, however, that, as far as it extends to such a case as the present, at least, the case was rightly decided. There may be cases in which the circumstances are different from those in *Clarke v. Cuckfield Union* and the present case, and which would still be governed by the principles laid down in the decisions in the Exchequer; those we leave to be decided when they arise; but so far as those prior decisions are inconsistent with the decision in *Clarke v. Cuckfield Union* we prefer to follow the authority of *Clarke v. Cuckfield Union*, which we think founded on justice and convenience." *Nicholson v. Bradford Union*, L. R. 1 Q. B. 620. See *The Mayor, &c. of Ludlow v. Charlton*, 6 M. & W. 815; *Diggle v. The London, &c. Ry. Co.*, 5 Ex. 442; *Lamprell v. The Billericay Union*, 3 Ex. 283; *Smart v. West Ham Union*, 10 Ex. 867; 11 Ex. 867; *The London Dock Co. v. Sinnott*, 8 E. & B. 347; *Arnold v. Mayor of Poole*, 4 M. & G. 860; *Copper Miners' Co. v. Fox*, 16 Q. B. 229.

the contract is entered into. A company, C., formed for the purpose (amongst others), of constructing railways, by a letter from the secretary gave an order to company E. for 500 tons of rails at a certain price, to be paid for by three months acceptances from the date of delivery. The managing director of Company E. was also a director of Company C. The rails were intended to be used in the construction of a line of railway which the managing director of Company C., and not the company itself, had undertaken to make. The rails were made, but were not delivered, in consequence of Company C. being ordered to be wound up. Held, that the secretary's order was binding on Company C., although not under seal, and although the managing director of Company E. might have known the purpose for which the rails were to be used; and also, that Company E. was entitled to prove in the winding up for damages occasioned by the non-acceptance of the rails; and that the court would not sanction the giving of acceptances by the official liquidator for the price of the rails.¹

² *In re Contract Corporation*, Claim of Ebbw Vale Company, L. R. 8 Eq. 14.

The question that was raised in this case, but not pressed, that a corporation cannot contract without seal, was decided in, among other cases, *South of Ireland Colliery Co. v. Waddle*, L. R. 3 C. P. 463, where Bovill, C. J., says: "The objection is entirely a technical one; but, though technical, if it be in accordance with law the court is bound to give effect to it. Originally all contracts by corporations were required to be under seal. From time to time certain exceptions were introduced, but these for a long time had reference only to matters of trifling importance and frequent occurrence, such as the hiring of servants and the like; but in progress of time, as new descriptions of corporations came into existence, the courts came to consider whether these exceptions ought not to be extended in the case of corporations created for trading and other purposes. At first there was considerable conflict; and it is impossible to reconcile all the decisions on the subject. But it seems to me that the exceptions created by the recent cases are now too firmly established to be questioned by the earlier decisions, which, if inconsistent with them, must, I think, be held not to be law. These exceptions apply to all contracts by trading corporations entered into for the purposes for which they are incorporated. A company can only carry on business by agents, managers, and others; and if the contracts made by these persons are contracts which relate to objects and purposes of the company, and are not incon-

sistent with the rules and regulations which govern their acts, they are valid and binding on the company, though not under seal. It has been urged that the exceptions to the general rule are still limited to matters of frequent occurrence and small importance. The authorities, however, do not sustain that argument. It can never be that one rule is to obtain in the case of a contract for £50 or £100, and another in the case of £50,000 or £100,000." In *Henderson v. Australian Royal Mail Steam Nav. Co.*, 5 E. & B. 409, the existence as well as the propriety of the modern rule was affirmed. In this case Erle, J., said: "I cannot think that the magnitude or the insignificance of the contract is an element in deciding cases of this sort. No doubt when the exception originated it was applied to small matters, such as the appointment of servants, being all that municipal corporations required. But as soon as it became extended to trading corporations it was applied to drawing and accepting bills of any amount; and this shows that insignificance is not an element. Neither, I think, is frequency. The first time that a company makes a contract of any kind, that contract must have been unprecedented. The question is, I think, whether the contract in its nature is directly connected with the purpose of the incorporation."

In *Clarke v. Cuckfield Union*, 1 Bail. C. C. 85, it was laid down by Wightman, J., that the general rule that a corporation aggregate cannot contract except by deed admits of an exception in cases where the making of a certain description of contract

3. ENGLISH COMPANIES' ACTS.

Many questions have arisen in England with reference to sales of shares in companies under the English Companies' Acts, and,

is necessary and incidental to the purposes for which the corporation was created. The same principle was acted upon in *Beverley v. The Lincoln Gas Light & Coke Co.*, 6 A. & E. 829; *Sanders v. St. Neot's Union*, 8 Q. B. 810; *Copper Miners' Co. v. Fox*, 16 Q. B. 229; *Broughton v. The Manchester Waterworks' Co.*, 3 B. & Ald. 1; *Australian Royal Mail Steam Nav. Co. v. Marzetti*, 11 Ex. 228; *The Fishmongers' Co. v. Robertson*, 5 M. & G. 131; *Reuter v. Electric Tel. Co.*, 6 E. & B. 341; and in many other cases. In *Australian Royal Mail Steam Nav. Co. v. Marzetti*, 11 Ex. 228, Pollock, C. B., said: "It is now perfectly established by a series of authorities that a corporation may with respect to these matters for which they are expressly created deal without seal. This principle is founded on justice and public convenience, and is in accordance with common sense." See also *East London Waterworks' Co. v. Bailey*, 4 Bing. 283; *Finlay v. Bristol & Exeter Ry. Co.*, 7 Ex. 409; *Lowe v. London & Northwestern Ry. Co.*, 21 L. J. Q. B. 361; *Lamprell v. Billericay Union*, 3 Ex. 283; *The Dean and Chapter of Rochester v. Pierce*, 1 Camp. 466; *The Mayor of Stafford v. Till*, 4 Bing. 75; *The Mayor and Burgesses of Carmarthen v. Lewis*, 6 C. & P. 608.

Anciently it was held that a corporation aggregate could not do anything without deed. 13 H. 8, 12; 4 H. 7, 6; 7 H. 7, 9. Afterwards "for convenience's sake" it was allowed to act in ordinary matters without deed, as to retain a servant, cook, or butler: *Plow. 91, b.*; 2 Saund. 305, or to appoint a bailiff to take a distress. 3 Lev. 107. But in case of anything of consequence, or the employing any one to act on their behalf in a matter which was not an ordinary service, a corporation aggregate could not do that without deed. This was the distinction taken in *Horne and Ivy's Case*, reported in 1 Vent. 47; 1 Mod. 18; 2 Keb. 567. See *Damper v. Symms*, 1 Rol. Ab. 514; *Rex v. Biggs*, 3 P. Wms. 419. At length it seems to have been established that though they could not contract directly except under their corporate seal, yet they might by mere vote or other corporate act not under their corporate seal appoint an agent, whose acts and contracts within the scope of his authority would be binding on the corporation. As soon as the doctrine was established that their regularly appointed agent could contract in their own name without seal the

whole doctrine that a corporation aggregate could not contract without seal was overthrown, for clearly anything that it is competent for a principal to do by his agent he can legally do himself. Hence it is now, and has been for a long time past, well established both in England and in this country, that wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action will lie. *Bank of England v. Moffat*, 3 Bro. Ch. 262; *Rex v. Bank of England*, Doug. 524, n.; *Bank of Columbia v. Patterson's Admstr.*, 7 Cranch, 299, 305; *Gray v. Portland Bank*, 3 Mass. 364; *Worcester Turnpike Corporation v. Willard*, 5 Mass. 80; *Gilmore v. Pope*, *Id.* 491; *Andover, &c. Corporation v. Gould*, 6 Mass. 40. It was decided in *McMasters v. Reed's Executors*, 1 Grant (Pa.), 36, 49, upon principle as well as upon authority, that corporations are bound by all contracts, whether express or implied, whether by bond, bill of exchange, or negotiable note, entered into in the usual and necessary course of their legitimate business, except where there is a statutory prohibition. See *The People v. The Utica Ins. Co.*, 15 Johns. 383; *New York Firemen's Ins. Co. v. Sturges*, 2 Cow. 675; *New York Firemen's Ins. Co. v. Ely*, *Id.* 699; *Dana v. The Bank of The United States*, 5 W. & S. 243; *Mott v. Hicks*, 1 Cow. 513; *Kelley v. Mayor of Brooklyn*, 4 Hill, 265; *Moss v. Oakley*, 2 Hill, 265; *Barker v. Mech. Ins. Co.*, 3 Wend. 97; *Gassett v. Andover*, 21 Vt. 342; *San Antonio v. Lewis*, 9 Tex. 69.

In general a corporation is restricted to the mode of contracting prescribed by the charter. But where no particular mode is prescribed by the act of incorporation it is well settled in this country that the acts of a corporation, written or unwritten, evidenced by note, are as completely binding on it, and are as complete authority to its agents, as the most solemn acts done under its corporate seal; that it may as well be bound by express promises through its authorized agents as by deed; and that promises may as well be implied from its acts and the acts of its agents as if it had been an individual. *Abby v.*

while applicable in analogous cases in this country, as they have incidents peculiar to themselves, we devote a separate section of this Part to cases connected with such questions.

A limited company was incorporated under the English Joint Stock Companies' Acts, with the objects, as stated in its memorandum of association, of acquiring and carrying on a manufacturing business, and any other businesses and transactions which the company might consider to be in any way conducive or auxiliary thereto or in any way connected therewith. The memorandum did not authorize the company to purchase its own shares, but its articles of association did so. The company having gone into liquidation, a former shareholder made a claim against the company for the balance of the price of his shares sold by him to the company before the liquidation and not wholly paid for. The House of Lords held,¹ reversing the decision of the Court of Appeal, that such a company had no power under the Companies' Acts to purchase its own shares; that the purchase was, therefore, *ultra vires*; that a transaction not within the scope of the memorandum of association is incapable of ratification, and that the claim must fail.²

The plaintiff having through his brokers on the stock exchange

Billups, 35 Miss. 618, 630. In *Ring v. Johnson County*, 6 Iowa, 265, the well-established doctrine is laid down that corporations of all kinds may be bound by contracts not under their seals. They may make a binding contract in writing without using the seal, and so they may be held liable on verbal contracts. And as they may make so they may ratify and adopt as their own, without the use of their seal, that which has been done by another, or by an officer out of the usual line of his duties. *Merrick v. The Burlington, &c. Co.*, 11 Iowa, 74. In *Blanchard v. The Maysville, &c. Co.*, 1 Dana (Ky.), 87, it is said: "Whatever diversities may be supposed to exist between the ancient and modern decisions as to the capacity of a corporation to bind itself by express contract without its common seal, and however undefined the cases may be supposed to be, in which, according to many authorities, such a capacity exists, there can be no doubt that a statutory corporation may be liable to an action upon a liability imposed by its charter, or resulting by implication of law from its acts; and records and judgments, even erroneously rendered, on parol contracts, but unreversed and not void, may impose legal liability on all corporations." See, further, *Frankfort Bridge Co. v. City of Frankfort*, 18 B. Monr. 41; *Waller v. The*

Bank of Kentucky, 3 J. J. Marsh. 201; *St. Andrews Bay Land Co. v. Mitchell*, 4 Fla. 192, 199; *Everett v. The United States*, 6 Port. (Ala.) 166, 181.

¹ *Trevor v. Whitworth*, 12 App. Cas. 409.

² A company cannot employ its funds for the purpose of any transactions which do not come within the objects specified in the memorandum, and a company cannot by its articles of association extend its power in this respect. *Ashbury Railway Carriage and Iron Co. v. Riche*, L. R. 7 H. L. 653. This case also decides that a transaction not within the scope of the memorandum is incapable of ratification. See also *Teasdale's Case*, L. R. 9 Ch. 54; *Hope v. International Financial Soc.*, 4 Ch. Div. 327, 336; *Guinness v. Land Corp. of Ireland*, 22 Ch. Div. 347, 375; *In re Dronfield Silkstone Coal Co.*, 17 Ch. Div. 76; *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43. It is inconsistent with the essential nature of a company that it should become a member of itself. It cannot be registered as a shareholder to the effect of becoming debtor to itself for calls, or of being placed on the list of contributories in its own liquidation. *In re Dronfield Silkstone Coal Co.*, 17 Ch. Div. 76, 83; *Trevor v. Whitworth*, 12 App. Cas. 409, 424.

sold to the defendant, a jobber, ten shares in Overend, Gurney & Co., Limited, the defendant on the name-day gave to the plaintiff's brokers the name of Goss as the ultimate buyer. No objection was made to the name, and the plaintiff executed a transfer to Goss of the ten shares. It was afterwards discovered that the brokers named on the ticket as the brokers of Goss had been instructed by S. to buy, and had in fact bought, a large number of shares for S. as undisclosed principal. The ten shares in question (the dealings not being for specific shares) were delivered to them as part of the shares so purchased, but the name of Goss was passed in pursuance of S.'s instructions, and according to an arrangement by which Goss, who was a person of no means, consented to allow his name to be passed in consideration of a sum of money paid to him. The purchasing brokers, as well as the defendant, were ignorant of this arrangement. Calls having been made on the shares, which the plaintiff was compelled to pay, and which he was unable to recover from Goss, he brought this action to recover them from the defendant. It was held by the Court of Exchequer (Cleasby, B., dissenting) that Goss was an ultimate purchaser within the meaning of that term as applied in the usage of the Stock Exchange; that the defendant had fulfilled his obligation by passing a name to which no objection was taken according to the usage; and, that, in the absence of any fraud, either in the defendant or in the purchasing brokers, the defendant could not be treated as ultimate buyer himself or be made liable for calls.¹ On appeal to the Exchequer Chamber² this judgment was affirmed, Rush, J., dissenting.

The case of *Merry v. Nickalls*³ was taken, on appeal, to the House of Lords,⁴ when the decree of the court below was affirmed. The argument on the part of the appellant was, that, as there were ten days during which the vendor could object to the name of the ultimate purchaser, unless the objection were made within that time the seller was concluded. But the House of Lords held that this only applied to the case where the name given was that of one capable of contracting, and did not apply to the case where a name is handed in which is, in fact, no name at all; as a ficti-

¹ *Maxted v. Paine*, L. R. 4 Ex. 203. See, also, *Maxted v. Paine* (first action), L. R. 4 Ex. 81, where a somewhat similar question is decided. See, also, *Grissell v. Bristowe*, L. R. 3 C. P. 112; L. R. 4 C. P. 36; *Coles v. Bristow*, L. R. 4 Ch. 3; *Cruse v. Paine*, L. R. 4 Ch. 441; *Torrington v. Lowe*, L. R. 4 C. P. 26; *Shephard v. Murphy*, Ir. L. R. 2 Eq. 544; *Payne's Case*, L. R. 9 Eq. 223; *Bank of Hindustan v. Kintrea*, L. R. 5 Ch. 95;

Castellan v. Hobson, L. R. 10 Eq. 47; *Whitehead v. Izod*, L. R. 2 C. P. 228; *Shaw v. Fisher*, 5 De G. M. & G. 596. See *post*, *Nickalls v. Merry*, L. R. 7 H. L. 530, where *Maxted v. Paine* (1st action), L. R. 4 Ex. 81, is approved.

² L. R. 6 Ex. 132.

³ L. R. 7 Ch. 733, stated by us *ante*, p. 133.

⁴ *Nickalls v. Merry*, L. R. 7 H. L. 530.

tious name, or a name given without authority, or the name of a person who cannot contract, as being an infant or married woman. Lord Hatherley put the case as being as plain as possible; as one of the simplest elements of the law of contracts; that, it being once admitted that a jobber had made a contract by which he was bound, he could not discharge himself by saying, — “I have introduced a person who is utterly incapable of being bound; you must take him in place of me, for the rule of the Stock Exchange says so.”¹

¹ Lord Hatherley, in disposing of this, practically the contention for the appellant, said: “If such a rule existed, it could not be alleged that there was any common sense, if I may say so, on the face of such a rule; but if ever such a rule should be made, it will be time enough for the courts of law to consider how far such a rule should be admitted, or how it can be reconciled with common sense. At present it appears to me that there is no such rule, and that the jobber is bound to liberate himself from liability by producing the name of a person who is capable of contracting. A party who is supposed to be incapable of performing the contract for want of means, but who is capable of entering into the contract, may have given authority to give his name. That is one thing. In that case ten days are given, under the rule of the Stock Exchange, to say whether or not you will accept the contracting party whose name is given to you; for he is really a contracting party. But it is another thing if he is a person who cannot, by law, contract. That a contracting party must be produced I think is beyond doubt. . . . When the case comes to be sifted, it is almost decided by a simple enunciation of the facts.” The other Law Lords expressed similar views.

In this case the holding in *Rennie v. Morris*, L. R. 13 Eq. 203, was disapproved. There it was held that by the usage of the Stock Exchange the jobber, or dealer in shares, is, in the absence of fraud, discharged from liability when he has given the name of the transferee and paid for the shares. Therefore, where a jobber contracted on the Stock Exchange to purchase the plaintiff's shares in a company, and gave in to the plaintiff's brokers a ticket with the name of the intended transferee, which had been passed in to him; and, after the execution of the transfer, it was discovered that the transferee was an infant, of which neither party was previously aware; and the plaintiff became liable for calls; the jobber having given the plaintiff all the information in the matter which was required; in a suit by

the plaintiff against the jobber seeking indemnity for the shares, the court held that, under the circumstances, the jobber was discharged. *Rennie v. Morris*, L.R. 13 Eq. 203. The two cases of *Maxted v. Paine* (1st action), L. R. 4 Ex. 81; (2nd action), L. R. 4 Ex. 203; L. R. 6 Ex. 132, exemplify the distinction established by the authorities as to the performance or non-performance of the jobber's contract. In the first action, the defendant, the jobber, passed the name of a person as purchaser of the shares without his sanction or authority. The seller, therefore, could not compel him to accept a transfer of the shares. It was accordingly held that the jobber was not exonerated from liability upon his contract. In the second action, the jobber was held to be released by having given the name of a nominee of the real buyer of the shares; a person, it is true of no means, but capable of contracting, who, in consideration of a small sum of money, had consented to allow his name to be used as the proposed transferee of the shares. The jobber's contract, therefore, is of this description. It is at first a temporary and conditional contract; but it becomes absolute upon his failure to furnish by the named day the name of a person capable and willing to become the transferee of the shares, so that the seller by executing a transfer may make with him a new contract in substitution of the original one with the jobber. This being the nature of a jobber's contract, it follows as a consequence that he does not perform what he undertakes by giving the name of a person under disability, with whom no new binding contract could be made, to be substituted for his own. *Nickalls v. Merry*, L. R. 7 H. L. 530, 544, *per* Lord Chelmsford. See *Allen v. Graves*, L. R. 5 Q. B. 478; *Bowring v. Shepherd*, L. R. 6 Q. B. 509; *Paine v. Hutchinson*, L. R. 6 Ex. 132; *Shepherd v. Murphy*, L. R. 3 C. P. 112; *Castellan v. Hobson*, L. R. 10 Eq. 47; *Stikeman v. Dawson*, 1 De G. & Sm. 90; *Nelson v. Stocker*, 4 De G. & J. 458; *Shepherd v. Gillespie*, L. R. 5 Eq. 293; *Duncan v. Hill*, L. R. 6 Ex. 255; *Weston's Case*, L. R. 5 Ch. 614; *Dent v.*

A. read a prospectus issued by certain persons, the directors of a company, which proposed to carry on the business of mining, and getting and crushing minerals in connection therewith, and, on the faith of the representations there made, among others of a similar nature, that a valuable mine in America had been contracted for (the claims in which were described as very profitable), wrote to apply for shares. It turned out that the mine contracted for was valueless. On Dec. 30, 1865, this fact, without the particulars, was communicated to him in a circular sent out by the directors. On Jan. 19, a second circular explained the particulars, and announced that another and a really valuable mine had been purchased by the agents sent to America by the directors. On Feb. 6, 1866, A. filed his bill to be relieved from his shares; to be repaid the money he had already paid on their allotment, and to restrain the directors from suing him on calls. On April 29, an injunction to restrain was granted.¹ On the 27th, a petition was presented for an order to wind up the company. On May 28, a winding-up order was granted, A.'s name being placed on the list of contributories. On July 19, A. took out a summons to have his name removed from the list; but his application was, on July 13, refused by the Master of the Rolls.² On appeal, the Lords Justices ordered A.'s name to be removed from the list.³ The defendants then appealed to the House of Lords,⁴ when the decision of the Lords Justices was affirmed. The contract being *ab initio* voidable, the House of Lords held that the agreement subsisted until rescinded; that is to say, until rescinded by the declaration of him who was sought to be bound by it, that he no longer accepted the agreement, but entirely rejected and repudiated it. The moment the company were told that the contract was rejected, and that he claimed no interest under their fraudulent act, it was their duty (to spare all further controversy) to have removed his name, which could no longer be retained there, the contract having been avoided. This not having been done, and the respondent having filed his bill, praying to have his name removed from the lists of the company, he was entitled to have his name removed, even though between the date of his filing his bill and the decree of the court upon it an order had been obtained to wind up the company; the "rescission" of the contract, as far as the rescission is necessary to

Nickalls, 22 W. R. 218; Richardson's Case, L. R. 19 Eq. 588; Hawkins v. Maltby, L. R. 6 Eq. 505; L. R. 4 Ch. 200; Hogkinson v. Kelly, L. R. 6 Eq. 496; Maxted v. Morris, 21 L. J. N. s. 535.

¹ Smith v. The Reese River Silver Mining Co., L. R. 2 Eq. 264.

² *Ibid.* 36 L. R. Ch. 385.

³ *Ibid.* L. R. 2 Ch. Ap. 604.

⁴ Reese River Silver Mining Co. v. Smith, L. R. 4 H. L. 64.

be the act of a court of competent authority, dating from the moment when proceedings were taken invoking the aid of that competent authority, so that the party seeking such aid is not to be affected by the subsequent acts of the company or its creditors. Lord Westbury, on the ground that it was necessary to be extremely cautious in the case, in view of the numerous *dicta* and decisions bearing on it, based his opinion in the case on the distinguishing feature in it, that a suit was instituted, and was in full progress, and had given birth to a judicial order at the instance of the respondent, anterior to the making of the winding-up order.¹

In *Henderson v. Lacon*,² where there was misrepresentation in the prospectus, issued by the authority of the directors, *In re* Reese River Company, Smith's Case,³ was followed; and the plaintiff, who had bought shares in the company, on the faith of the prospectus, and had paid deposit and allotment on account of the purchase of shares, had a decree against the directors and the company to have these repaid and to have his name removed from the register of shareholders.⁴

¹ L. R. 4 H. L., at p. 76. In dealing with the question of fraud in this case, Lord Cairns said: "As to the first part of the case, namely, that which rests upon the rights of the respondent, apart from the circumstances of the winding up of the company, to repudiate his shares in the company, I never have entertained, and I certainly do not now entertain, any doubt; and I hardly think that it was gravely argued at the bar that in this case a fraud had not been committed against the respondent. When I say 'a fraud,' I do not enter into any question with regard to the imputation of what may be called fraud in the more invidious sense against the directors. I think it may be quite possible that they were ignorant of the truth of the statements made in their prospectus. But I apprehend it to be the rule of law, that if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue. Upon that part of the case I apprehend that there is no doubt." *Reese River Silver Mining Co. v. Smith*, L. R. 4 H. L. at p. 79. See *Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99; *Ayre's Case*, 25 Beav. 513; *Ravlin v. Wickham*, 3 De G. & J. 304; *Oakes v. Turquand*, L. R. 2 H. L. 325.

² L. R. 5 Eq. 249.

³ L. R. 2 Ch. Ap. 604; L. R. 4 H. L. 64.

⁴ Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares; and they have no right to turn round upon those who refuse to fulfil their contracts to take shares, and say to them, "You ought to have been more prudent, more circumspect, more cautious, more vigilant; you ought, by applying your reasoning powers, to have concluded that our representations could not be true in the sense which the language we used in the prospectus naturally and fairly imports." *New Brunswick & Canada Ry., &c. Co. v. Muggerridge*, 1 Dr. & Sm. 363, 382, *per* Sir Richard Kindersley; referred to with marked approval by Sir W. Page Wood, who says: "In this instance it appears to me that the *scienter* is clearly fixed upon the directors, from the moment you find a representation concerning their own acts which is incorrect, and which they must

A bill was filed by the purchaser of shares to have the purchase declared void on the ground of fraud. The bill having been dismissed by Stuart, V. C.; on appeal to the Lords Justices, the order of the Vice-Chancellor was reversed.¹ On appeal to the House of Lords, the judgment of the Lords Justices was affirmed.² In the decision of the case, the following principles were established:—

First. Where a person believes that he has been misled by representations which are false or deceptive, into taking shares in a proposed company, it is his duty to raise the objection at an early period, and to be guilty of no needless delay.

Second. The same rules as to false or deceptive representations which are applicable to contracts between individuals, are also applicable to contracts between an individual and a company; therefore, no misstatement or concealment of any material facts or circumstances ought to be permitted in a prospectus issued to invite persons to become shareholders in a projected company.

Third. The public are, in such a case, entitled to have the same opportunity of judging of everything material to a knowledge of the true character of the undertaking as the promoters themselves possess.

Fourth. Where there has been fraudulent misrepresentation, or wilful concealment of facts by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it that he might have known the truth by proper inquiry.

Fifth. The phrase “available capital of the company” is not a true, but is a deceptive description of capital, which may be raised under the borrowing powers conferred upon directors.

Sixth. Where a prospectus described a contract for the construction of a line of railway as entered into at a “price considerably within the available capital of the company,” and the facts were that, from the nominal capital of £500,000 were to be deducted £50,000 as the price of purchasing the concession to make the railway, and the contract price for making it was £420,000, the representation was held to be untrue and deceptive.

be taken to have known to be incorrect, and to have knowingly stated, and thereby to have misled the party complaining of the misrepresentation. I must say I think the result of all the cases which have occurred shows the great value of that golden legacy, if I may so term it, which has been left to us by Sir Richard Kindersley, who has condensed in a few words the whole doctrine as to the rule of conduct between shareholders and their directors, in the case of the New Brunswick & Canada Ry. Co. v. Muggerridge, 1 Dr. & Sm. 363; a case cited with approbation in the case of the Central Railway Co. of Vene-

zuela v. Kisch, L. R. 2 H. L. 113, in the House of Lords.” Henderson v. Lacon, L. R. 5 Eq. 249, 262. See Crawshaw v. Thornton, 7 Sim. 391; Atwood v. Small, 6 Cl. & F. 232; Hallows v. Fernie, L. R. 3 Eq. 520; Warren v. Richardson, 1 You. Ex. Eq. 1; Clement v. Tasburgh, 1 Jac. & W. 112; Cadman v. Horner, 18 Ves. 110; Conybeare v. New Brunswick & Canada Co., 29 L. J. Ch. 435; Aberarman Ironworks v. Wickens, L. R. 5 Eq. 485, and cases there cited.

¹ Central Railway Co. of Venezuela v. Kisch, 3 De G. J. & S. 122.

² *Ibid.* L. R. 2 H. L. 99.

Seventh. Where a prospectus of a railway company stated that "the engineer's report, maps, plans, etc., may be inspected, and further information obtained at the offices of the company;" an applicant for shares signed the printed form of application, in which, as usual, it was stated that he agreed to be bound by the conditions and regulations contained in the memorandum and articles of association. An examination of all of these papers would have afforded him the information, the want of which he alleged as a ground for rescinding the contract; but, trusting to the fraudulent representations made to him with reference to them, he did not examine them all: Held, that his neglect to do so was no answer to his demand to be relieved from the contract.¹

A broker employed by the plaintiff to purchase shares, which the plaintiff paid for, procured the instrument of transfer to the plaintiff, and the plaintiff's signature thereto, and received from the plaintiff the certificates and transfer for the purpose of registration. Soon afterwards he fraudulently procured the plaintiff to cancel his signature to the transfer, and, by means of the cancelled transfer and the certificates, induced the vendor to execute a fresh transfer to himself, and thereupon procured the shares to be registered in his own name, and then mortgaged them to one of the defendants. On the part of the innocent mortgagee, it was claimed that the principle of the court of equity is, that where the owner of property puts it into the power of another to represent himself as the owner, and to obtain credit from third persons in that character, the loss must fall on the true owner, rather than on those who have advanced their money *bonâ fide* and without notice; for which *Dodds v. Hills*,² and *Perry Herrick v. Attwood*,³

¹ When once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, "You, at least, who have stated what is untrue, or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty." *Per* Lord Chelmsford, in *Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99, 121. Lord Lyndhurst, in the case of *Small v. Attwood*, 6 Cl. & F. 232, 395, said: "Where representations are made with respect to the nature and character of property which is to become the subject of purchase affecting the value of that property, and those representations after-

wards turn out to be incorrect and false, to the knowledge of the party making them, a foundation is laid for maintaining an action in a court of common law to recover damages for the deceit so practised; and in a court of equity a foundation is laid for setting aside the contract which was founded upon that basis." And in the case of *Dobell v. Stevens*, 3 B. & C. 623, to which he refers as an authority in support of the proposition, which was an action for deceit in falsely representing the amount of the business done in a public-house, the purchaser was held to be entitled to recover damages, although the books were in the house, and he might have had access to them if he thought proper. See *Ship's Case*, 2 De G. J. & S. 544; *Jennings v. Broughton*, 17 Beav. 234; *Rawlins v. Wickham*, 3 De G. & J. 304.

² 2 H. & M. 424.

³ 2 De G. & J. 21.

were cited. But this contention did not prevail. It was held, that as there was no negligence or laches proved against the plaintiff, his prior and better title must prevail over that of the mortgagee; and, as the effect of the first transfer was not destroyed by the cancellation fraudulently procured, the registration in the name of the broker, and the transfer to his mortgagee, were decreed to be set aside.¹

But *In re Overend, Gurney and Company, Ex parte Oakes and Peek*,² the principle that, where one of two innocent parties must suffer from the fraud of a third, it should be the party who, by his negligence or supineness, has enabled the third party to commit that fraud, was freely applied by Sir R. Malins, V. C. The question in this case arose between shareholders who had, from the fraudulent representations of the directors of the company, been induced to take stock in it, and the creditors, who, as described by the court, were "even more innocent, if possible, than the shareholders." The case was argued at very great length by brilliant counsel, and, although the innocent shareholders had been already involved in enormous losses, their application to have their names removed from the register of members was refused, and it was held that, although they had been induced to take shares and to become members by reason of the fraudulent concealment or misrepresentation of the directors, they were not entitled to relief as against the still more innocent creditors.

It was conceded on both sides that a contract induced by fraud was voidable only, and not absolutely void; and that innocent parties acting on the faith of it until the contract was avoided were protected. But, it was contended, that the whole doctrine comprised in these two propositions applied only to cases of the delivery of goods, or the delivery, by the fraudulent possessor, of some legal symbol of property, the possession of which is *primâ facie* evidence of property in the possessor, — the delivery of such a symbol of property to the fraudulent doer, who, having this symbol of property in his possession, passes it for value to an innocent purchaser, and who therefore asks to be protected. It was claimed that the doctrine was suited only to that class of cases which implied that the innocent purchaser was acting on the faith of the specific contract in question, — that it must be a direct acting upon the faith of a specific contract, or the doctrine does not apply; and that the principle of the doctrine could have no

¹ *Donaldson v. Gillot*, L. R. 3 Eq. 274. See *Taylor v. Great Indian Ry. Co.*, 4 De G. & J. 559, 574; *Bank of Ireland v. Trustees of Evans's Charities*, 5 H. L. C. 389; *Ward v. South Eastern Ry. Co.*,

2 E. & E. 812; *Copeland v. North Eastern Ry. Co.*, 6 E. & B. 277; *Reg. v. General Cemetery Co.*, 6 E. & B. 415.

² L. R. 3 Eq. 576.

application whatever as between creditors and members of a corporation proper. But this attempt at refining away the principle involved, as entirely untenable, necessarily failed.

The case came up again on appeal to the House of Lords,¹ when the judgment of Malins, V. C., was affirmed. The following, among other principles, are laid down in the case:—

First. Where a person has been, by the fraudulent misrepresentations of directors, or by their fraudulent concealment of facts, drawn into a contract to purchase shares in a company, the directors cannot enforce the contract against him, but he may rescind it; providing he do so within a reasonable time.

Second. A contract induced by fraud is not void, but voidable; and, therefore, though the persons who by their fraud induced it may not enforce it, other persons may, in consequence of it, acquire interests and rights, which they may enforce against the party who has been so induced to enter into it.

Third. The direct remedy of a creditor of an incorporated company is solely against the company, and not against its individual members, as upon a contract with them. But, though, as between the company and the member, the member might have a good legal or equitable defence to a call upon himself, he may be liable to contribute to the assets of the company required for the payment of the company's creditors.

Fourth. Where a registered memorandum of association differed from the prospectus on which it professed to be founded, and on which, as setting forth the true objects of the association, A. had become a shareholder; though he, on discovering the difference, might have repudiated his shares, he could not, after the failure of the company, relieve himself from liability to contribute to the debts of the association, on the ground that he had been ignorant of something which, with proper diligence, he might have known.

Fifth. It is the duty of a person taking shares in a company to use reasonable diligence in making himself acquainted with the provisions of the memorandum of association; and he must take the consequences of his neglect. Thus, where A. applied, on the faith of statements in a prospectus, for shares in a company, which were allotted to him, his name was put on the register of shareholders. At the end of nine months, the company failed, and was ordered to be wound up. A. then applied to have his name removed from the list of contributories, on grounds of fraudulent misrepresentation, which would have been sufficient to have caused his application to be granted, if it had been made promptly

¹ *In re Overend, Gurney & Co., Oakes v. Turquand*, L. R. 2 H. L. 325.

before the failure. It was held, affirming the decision of Malins, V. C., that it was properly placed there and could not be removed, owing to the rights of third parties, the creditors, which had, in the mean time, intervened.¹

The principle of *Oakes v. Turquand*² extends to the voluntary winding up of a company under the Companies' Act, 1862 and 1867. Where, therefore, a company, its assets being insufficient to meet its liabilities, is voluntarily wound up, a shareholder in such company, who has been induced to take shares by the fraudulent representation of its directors, cannot repudiate his shares nor seek to rescind a contract in respect of them, nor can he recover back from the company money paid by him for the shares.³

¹ *In re Overend, Gurney & Co., Oakes v. Turquand*, L. R. 2 H. L. 325. This case, both in the court below and in the House of Lords, followed and approved *Henderson v. Royal British Bank*, 7 E. & B. 356, where it was decided that it is no defence against a creditor of the company that the shareholder against whom execution is levied, or sought to be levied, was induced to become a shareholder by the fraud of the company. Lord Campbell, in this case, in describing the attempt of a shareholder to relieve himself from liability to the creditors of the company, said: "It would be monstrous to say that he, having become a partner and a shareholder, and having held himself out to the world as such, and having so remained until the concern stopped payment, could, by repudiating the shares on the ground that he had been defrauded, make himself no longer a shareholder, and thus get rid of his liability to the creditors of the bank, who had given credit to it on the faith that he was a shareholder. It would be monstrous injustice, and contrary to all principle. Whether he could say that with regard to other shareholders not privy to the fraud, we need not say. There may be some difficulty about that. But that is not the question which we have to determine; which is simply whether this is an answer to a creditor who has given trust upon the faith of his being a shareholder. Suppose this were a common partnership, and that there was credit given to the firm, would it be any answer to an action by the creditor against one of the partners that the defendant was fraudulently induced by the other partners to become a partner? *Inter se*, that might be considered; but as between the firm and a creditor, it is a matter wholly immaterial." This case was approved and followed in *Dorsett v. Harding*, 1 C. B. N. S. 524, 532; in *Powis v. Harding, Ib.*

533; and in *Daniell v. The Official Manager of the Royal British Bank*, 1 H. & N. 681. In these cases it is held that, where it is sought to charge a shareholder for the liabilities of a company to a judgment creditor, such shareholder cannot resist the claim on the ground that he was induced to become a shareholder by fraud on the part of the company, and repudiated the shares after the company had become bankrupt, but as soon as he discovered the fraud; the judgment creditor being no party to the fraud. See further, *Bright v. Hutton*, 3 H. L. Cas. 341; *The Bwlch Mining Co.'s Case*, L. R. 2 Ex. 324; *Mixer's Case*, 4 De G. & J. 575; *Clarke v. Dickson*, E. B. & E. 148; *Ship's Case*, 2 De G. J. & S. 544; *Stewart's Case*, L. R. 1 Ch. App. 574; *Webster's Case*, L. R. 2 Eq. 741; *Saunderson's Case*, 3 De G. & Sm. 66; *Dodgson's Case*, 3 De G. & Sm. 85; *Sutton's Case*, 3 De G. & Sm. 264; *Chapman & Barker's Case*, L. R. 3 Eq. 361; *Bargate v. Shortridge*, 5 H. L. Cas. 297; *White v. Garden*, 10 C. B. 919; *Deposit Life Assur. Co. v. Ayseough*, 6 E. & B. 761; *Stevenson v. Newnham*, 13 C. B. 285, 302; *Wilkinson's Case*, L. R. 2 Ch. Ap. 536; *Lawrence's Case*, L. R. 2 Ch. Ap. 412.

² L. R. 2 H. L. 325.

³ *Stone v. The City and County Bank*, 3 C. P. D. 282. The decision in this case is put by Lord Justice Bramwell on very clear grounds, thus: "It was urged before us that, even if in a voluntary winding up, a person who has been induced to become a member of a company by fraud cannot get rid of his liability by rescinding within a reasonable time his contract to take shares, and must be placed upon the list of contributories for the benefit of creditors, nevertheless, as between himself and the other members of the company with whom he has become associated through the fraud of their agents, he may be en-

The following principles were laid down by Chelmsford, L. C., in the House of Lords in the *Western Bank of Scotland v. Addie*,¹ which was a suit in Scotland to rescind a share-taking contract, and for *restitutio in integrum*, or, alternately, for damages.

First. Where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors in the name of the company seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agents.²

titled to recover back the money which he has paid. I cannot assent to that argument. It seems to me to follow that a shareholder is a member of the company for all purposes, and that the remedy of a person who has been induced to become a shareholder by fraud of the company, is by an action for unliquidated damages, and not by an action to recover as a debt due to him the money which he has been induced to part with. Counsel contended that the reason why a defrauded shareholder is liable to the creditors of the company is, that having held himself out as a member, he is estopped from saying that he ought not to be a contributory upon the insolvency of the company. I doubt whether a shareholder is liable upon the ground of estoppel. I think his liability depends upon a principle similar to that upon which the decision in *Kinsford v. Merry*, 11 Ex. 577, proceeded. It was there held that if the owner of goods sells them owing to a fraudulent representation, and if before he discovers the fraud another person acquires some claim to them, he cannot afterwards rescind the contract. And I think it clear upon the authorities that whenever the rights of other persons intervene, a contract to take shares, though induced by fraud, cannot be rescinded. . . . I will state briefly the conclusions at which I have arrived. I think that the resolution to wind up voluntarily is good, and that the principle of *Oakes v. Turquand*, L. R. 2 H. L. 325, shows that where a company is being wound up either compulsorily, voluntarily, or under the supervision of the court, it is too late to rescind a contract to take shares, although that contract has been induced by fraud." *Stone v. The City and County Bank*, 3 C. P. Div. 282, 308.

The cases in this country establish the

same doctrine as that laid down in *Kinsford v. Merry*, 11 Ex. 577. *Buffington v. Gerrish*, 15 Mass. 156; *Mowry v. Walsh*, 8 Cowen, 238; *Root v. French*, 13 Wend. 570; *Gilbert v. Hudson*, 4 Me. 345. See *Hall v. Old Talargoch Lead Manuf. Co.*, 3 Ch. Div. 749, where, after resolutions had been passed and confirmed for the voluntary winding up of a company, a shareholder, in ignorance thereof, commenced an action against the company and the directors to have his name removed from the register, for a rescission of his contract to take shares, on the ground of misrepresentation in the prospectus, and to obtain repayment of all moneys paid, and an indemnity against future liability in respect of his shares; he having, as soon as he discovered the fraud, and before the commencement of the winding up, repudiated his shares, and asked the directors for a rescission of the contract and return of his money. It was held that the relief asked in the action was not inconsistent with the winding up, and a motion by the voluntary liquidator to stay all further proceedings in the action was refused with costs. See *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; *Swift v. Winterbotham*, L. R. 8 Q. B. 244; *Swift v. Jewsbury*, L. R. 9 Q. B. 301; *In re Keynsham Co.*, 33 Beav. 123; *In re Life Assoc. of England*, 34 L. J. Ch. 64; *In re Peninsular, &c. Banking Co.*, 35 Beav. 280; *In re Fire Brick and Blue Clay Co.*, L. R. 17 Eq. 268.

¹ L. R. 1 Sc. & D. Ap. 145.

² The cases prior to the decision of *Western Bank of Scotland v. Addie*, L. R. 1 Sc. & D. Ap. 145 (where the law was settled as stated in the text), were by no means harmonious. In *Dodgson's Case*, 3 De G. & Sm. 85, Vice-Chancellor Knight Bruce held that directors cannot be the agents of the body of shareholders to com-

Second. If a person makes an untrue statement, which he states to be the result of a *bonâ fide* belief of its truth, the *bona fides* is

mit a fraud; and that the directors only were liable for their conduct. This holding was adopted by Vice-Chancellor Parker in *Bernard's Case*, 3 De G. & Sm. 289, where he said: "Dodgson's Case shows that the directors cannot be the agents of the company to commit a fraud; and, therefore, even if the stockholder had been induced to take shares by the misrepresentation of the directors that was no reason why he should not be a contributory." But in *Brockwell's Case*, 4 Dru. 205, where the directors of the Royal British Bank, in their published reports, misrepresented the state of the company, and Brockwell, relying upon the truth of the reports, purchased some new shares which were issued by the company, upon which it was sought to make him a contributory, Vice-Chancellor Kindersley held that the reports of the directors, designedly published, must be considered as reports of the company, and Brockwell was removed from the list of contributories. *Brockwell's Case*, 4 Dru. 205, was overruled by Lord Campbell and the Lords Justices in *Mixer's Case*, 4 De G. & J. 575. Lord Campbell, in his judgment, said: "Clearly there was fraud, and gross fraud, on the part of the directors, and I have no doubt that Mixer was induced by fraud to take his shares. I think, however, that it was a fraud on the part of the directors which cannot be attributed to the company," and the shareholder was continued upon the list of contributories. In this case the correct reason was given why, even if the purchase of shares was induced by the fraud of the company, the person defrauded could not resist his liability to contribute as a shareholder. Lord Campbell said: "It is a settled rule that a contract obtained by fraud is not void, but that the party defrauded has a right to avoid it if he does so while matters remain in their former position." In the case of the *National Exchange Company of Glasgow v. Drew*, 2 Macq. Sc. Ap. 103, with reference to the responsibility of a company for the fraudulent misrepresentations of its directors, Lord Cranworth said: "What is the consequence of the company receiving a report and publishing it to the world? I confess that, in my opinion, from the nature of things, and from the exigencies of society, that must be taken, as between the company and third persons, to be a representation by the company. The company, as an abstract being, can represent or do nothing. It can only act by its managers. When, therefore, the directors, in the discharge

of their duty, fraudulently, for the purpose of misleading others as to the state of the concerns of the company, represent the company to be in a different state from that in which they know it to be, and when the persons to whom the representation is addressed act upon it in the belief that it is true, I cannot think that society can go on without treating that as a misrepresentation by the company." In the same case Lord St. Leonards said: "I have certainly come to this conclusion, that if representations are made by a company, fraudulently, for the purpose of enhancing the value of their stock, and they induce a third person to purchase stock, those representations so made by them for that purpose do bind the company. I consider representations by the directors of a company as representations by the company. Although they may be representations made to the company it is their own representation." Lord Westbury, in the *New Brunswick & Canada Ry. Co. v. Conybeare*, 9 H. L. Cas. 725, concurred with these views, where he said: "I certainly am not at all disposed to advise your lordships to throw any doubt upon this doctrine, that if reports are made to the shareholders of a company by their directors, and the reports are adopted by the shareholders at one of the appointed meetings of the company, and these reports are afterwards industriously circulated, misrepresentations must undoubtedly be taken after their adoption to be misrepresentations and statements made with the authority of the company, and therefore binding upon the company." Lord Cranworth, in this same case, adhering to the views he had expressed in the *National Bank of Glasgow v. Drew*, 2 Macq. Sc. Ap. 103, and in *Ranger v. The Great Western Ry. Co.*, 5 H. L. Cas. 72, 86, to the effect that if the shareholder had been induced to go into a transaction by that which could be called a fraudulent representation on the part of those through whom the negotiation proceeded, namely, the directors, that that was a fraud that would bind the company, said: "To that opinion I entirely adhere, and I think it would have been applicable in this case if it had been proved that there had been a fraudulent representation or concealment by the directors in order to induce the shareholder to purchase, not shares in the market (that is a very different thing), but shares belonging to the company, namely, forfeited shares, if the directors or the secretary acting for them had fraudulently represented something to him which was

to be tested by considering the grounds of such belief. And if an untrue statement is made, founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, it is fairly and correctly characterized as misrepresentation and deceit.

Third. Although the directors are merely agents of the company themselves, and, therefore, according to the well-known rule, they could not depute any other person to act for them, yet if they employ their manager to make false representations of the stability of the company, it would be of the same effect as if made by the directors themselves.

Fourth. If the person who has been induced to purchase shares by the fraud of the directors, prefers, instead of seeking to set aside the contract, to bring an action for damages for the deceit, such an action cannot be maintained against the company, but only against the directors personally.

And, per Lord Cranworth:—

First. Corporate bodies may be made responsible for the frauds of their agents to the extent to which the company has profited from the frauds; but the incorporated company cannot be sued for frauds committed by directors before the incorporation.

Second. It is necessarily to be inferred from the very expression *restitutio in integrum*, that relief can only be had where the party seeking it is able to put those against whom it is asked in the same situation in which they stood when the contract was entered into.¹

untrue. I, then, adhere to the opinion which I expressed in the former cases, that the company would have been bound by that fraud. But the principle cannot be carried to the wild length that I have heard suggested, namely, that you can bring an action against the company upon the ground of deceit because the directors have done an act which might render them liable to such an action. That I take not to be the law of the land; nor do I believe that it would be the law of the land if the directors were the agents of some person, not a company. The fraud must be a fraud that is either personal on the part of the individual making it, or some fraud which another person has impliedly authorized him to be guilty of." *New Brunswick & Canada Ry. Co. v. Conybeare*, 9 H. L. Cas. 711, 739. See *Eyre v. Burmester*, 10 H. L. Cas. 97; *Central R. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 167; *Downes v. Ship*, L. R. 3 H. L. 351; *Ernest v. Nicholls*, 6 H. L. Cas. 401; *Burnes v. Pennell*, 2 H. L. Cas. 497, 522; *Deposit Life Ass. Co. v. Ayscough*, 6 E. & B. 763.

¹ This is the doctrine of the civil law. *Calvinus, Lex*. It has also been adopted into the common law. Thus, it was held in *Clarke v. Dickson*, E. B. & E. 148, that a person induced by fraud to enter into a contract under which he pays money may, at his option, rescind the contract, and recover back the price as money had and received if he can return what he has received under it. But when he can no longer place the parties in *statu quo*, as if he has become unable to return what he has received in the same plight as that in which he has received it, the right to rescind no longer exists; and his remedy must be by an action for deceit, and not for money had and received. *Crompton, J.*, said in this case: "When once it is settled that a contract induced by fraud is not void, but voidable at the option of the party defrauded, it seems to me to follow that when that party exercises his option to rescind the contract he must be in a state to rescind; that is, he must be in a situation as to be able to put the parties into their original state before the contract. The plaintiff must rescind *in toto*

Third. Where a person has been defrauded by directors, and the subsequent acts and dealings of the company and himself have been such as to leave him no remedy but an action for the fraud, he must seek his remedy against the directors personally.

A Scotch company, whose nominal capital was £105,000, announced that £100,000 had been paid up, and that only £5000 could be called for. Relying upon this representation, a gentleman, resident in London, purchased, as a transferee, 300 shares; and paid his proportion of the outstanding £5000 to the company. The liquidator alleged that this gentleman "knew or ought to have known," that the company was a bubble; and proposed to make a call upon him of £30 for each of his shares; the £100,000 represented as actual capital not having been paid up. The appellant resisted the application, contending that, as he had performed his contract, no further demand could be made upon him. The Court of Session of Scotland, after much deliberation and difference of opinion, decided in favor of the respondent, the liquidator.¹

or not at all. He cannot both keep the shares and recover the whole price. That is founded on the plainest principle of justice. If he cannot return the article he must keep it, and sue for his real damage in an action on the deceit. Take the case of a butcher buying live cattle, killing them, and even selling the meat to his customers. If the rule of law were as the plaintiff contends, that butcher might, upon discovering a fraud on the part of the grazier who sold him the cattle, rescind the contract, and get back the whole price; but how could that be consistently with justice? The true doctrine is that a party can never repudiate a contract after, by his own act, it has become out of his power to restore the parties to their original condition." The principle was laid down by Lord Ellenborough in *Hunt v. Silk*, 5 East, 449, that where a contract is to be rescinded at all it must be rescinded *in toto*, and the parties put in *statu quo*.

This has since been acted upon in numerous cases in England and in this country. Parke, B., said, in *Blackburn v. Smith*, 2 Ex. 783, 790, "There can be no rescission of the contract unless the parties can be placed in *statu quo*." So, in *Sheffield Nickel Co. v. Unwin*, 2 Q. B. Div. 214, 223, Lush, J., said: "A contract voidable for fraud cannot be avoided when the other party cannot be restored to his *status quo*; for a contract cannot be rescinded in part and stand good for the residue. If it cannot be rescinded *in toto* it cannot be rescinded at all; but the party complaining of the non-performance or the fraud must resort to an action for dam-

ages." In *Clarke v. Dickson*, E. B. & E. 148, 153, counsel said: "It is hard if all remedy for the fraud is lost where the deceit can be prolonged till the deceived party has acted on it;" to which Crompton, J., replied: "All remedy is not lost. He can no longer rescind the contract, which would work injustice; but he may bring an action on the deceit, and recover his real damage." And Erle, J.: "That was the case of *Cole v. Bishop*, E. B. & E. 150, n. The purchaser was unable to treat the contract as void *ab initio*; but in a cross-action tried before me, of *Bishop v. Cole*, he recovered a full indemnity." And Crompton, J.: "When you enunciate the proposition that a party has a right to rescind you involve in it the qualification, if the state of things is such that he can rescind. If you are fraudulently induced to buy a cake you may return it and get back the price; but you cannot both eat your cake and return your cake." See *Deposit Life Ass. v. Ayscough*, 6 E. & B. 761; *Sully v. Frean*, 10 Ex. 535; *Ferguson v. Carrington*, 9 B. & C. 59; *Strutt v. Smith*, 1 C. M. & R. 312; *Campbell v. Fleming*, 1 A. & E. 40; *Harnor v. Grovas*, 15 C. B. 667; *Fitt v. Cassanet*, 4 M. & G. 903; *Beed v. Blandford*, 2 Y. & J. 278; *Norton v. Young*, 8 Greenl. 30; *Jenkins v. Simpson*, 14 Me. 364; *Coolidge v. Brigham*, 1 Met. 547; *Peters v. Gooch*, 4 Blackf. 515; *Brown v. Witter*, 10 Ohio, 142; *Johnson v. Jackson*, 27 Miss. 498; *Allen v. Edgerton*, 3 Vt. 442.

¹ *Jamieson v. Waterhouse*, Scotch Rep. 3d series, vol. vi. p. 591; *Scottish Jur.*, vol. xl. p. 306.

On appeal, the House of Lords held, reversing the decree of the court below, —

First. That the liquidator was wrong, the shareholder having done all that could legitimately be demanded of him under his contract.

Second. It is not incumbent on a shareholder to suspect fraud or institute inquiries where all seems fair and conformable to the requirements of the statutes.

Third. The liability of a shareholder is to be measured by his contract, as based upon the statutory documents, which are registered for the purpose of protecting the shareholders on the one hand, and the creditors on the other.

Fourth. The court cannot expand the contract; nor will it fix upon a party any engagement larger or other than that into which he has entered.

Fifth. There is nothing to warrant a contrary doctrine in *Overend & Gurney Case*,¹ where the shareholder's contract was enforced, but in no respect altered; the contract, as it existed at the time of the winding up, being the sole measure of liability.

Sixth. A shareholder has a right to stand upon his contract, and is not bound beyond it, at the suit of the liquidator.²

¹ L. R. 2 H. L. 325.

² *Waterhouse v. Jamieson*, L. R. 2 Sc. & D. Ap. 29. The question is put very clearly by Lord Hatherley, L. C.: "The real and substantial question appears to be this: Whether or not a person taking shares in a company established under a deed which recites, however untrue, that £100,000 has been paid, and engaging by his signature to that deed to meet all the contributions which remain to be levied, but which are not to exceed £5 a share, the rest having been paid; whether, moreover, a person having purchased shares in the market on which the representation is that £100 has been paid up on each share, and receiving certificates of those shares signed by the directors themselves, who were competent to act in the matter, and who gave such certificates, stating that £100 per share had been paid up, can afterwards, at the instance of creditors of the company, who discover that, in truth, no such payment has ever been made by the original holders of the shares, but that in reality the shares had been taken and issued to the public without the fact being known that while they were £105 shares only £5 or some very small amount had been paid upon them, whether such a shareholder can be sued on behalf of the creditors of the company for the £100 per share which remains unpaid; whether, the question being raised between

the creditors and the alleged shareholder, the shareholder can set up the defence that he is not liable to the creditors which he has contracted to pay." In answer to this Lord Hatherley, with whom agreed the whole House, said: "I confess, after some considerable hesitation, I have come to the conclusion that a shareholder is entitled to say: The contract I have entered into must be found in the deed into which I have entered. For all purposes as between me and third persons I am only to be held to have entered into those engagements which the deed itself represents me to have entered into; and as regards the shares which I have taken and purchased, having a document signed by those who are enabled to give such a certificate, certifying that a certain amount per share had been paid, which certificate is entered and duly registered as the act requires, for the very purpose of protecting the shareholders on the one hand and the creditors on the other, I am entitled to say, no fraud being chargeable against me, that I am only liable to the extent of the money which appeared by the certificate itself, given me by the directors of the company, to be unpaid."

The marked distinction between the decision in this case and in the *Overend & Gurney Case*, L. R. 2 H. L. 325, is thus clearly pointed out by the Lord Chancellor: "I think the principles upon which

A person purchasing chattels or goods, concerning which the vendor makes a fraudulent misrepresentation, may, on finding

that case was decided have really no bearing whatever upon the present question. There Mr. Oakes had undoubtedly become a member of the company. He knew all the objects for which it was founded, and the terms of its constitution, and he entered into the ordinary engagements. Then he said: True it is I have entered into those engagements; but I seek to be relieved from them because I was induced to enter into them by misrepresentations, without which I should not have become a shareholder. But this House held that whatever rights he might have acquired against those who made the fraudulent representations, he had as regarded the outer world executed an instrument by which every creditor had a right to believe that he was bound, and that he could not extricate himself after the winding-up, although before the winding-up he might have instituted proceedings to liberate himself from the engagements into which he had been led by those misrepresentations." *Waterhouse v. Jamieson*, L. R. 2 Sc. & D. Ap. at p. 33.

Lord Cairns said, in the case of *In re Duckworth*, L. R. 2 Ch. 578, "The liquidator represents the creditors *only because he represents the company*, and through the company the rights of the creditors are to be enforced." Lord Westbury, adopting this, in *Waterhouse v. Jamieson*, L. R. 2 Sc. & D. 33, comments upon it thus: "Now, here the appellant is a *bonâ fide* holder of shares, upon which, no doubt, there was a false statement made by the company of which he had no knowledge, and as to which he was under no obligation to inquire, and therefore he cannot be subjected to liability by having imputed to him a knowledge of the falsehood. Could the company recover against him? If there had been no winding-up order the question would not have admitted of a moment's doubt, and the winding-up order does not place the liquidator in a better position against the shareholder than the company were in." The principle involved in this case is of the highest practical importance, and we consider the case one of the greatest value in settling a question which, either directly or in strict analogy thereto, is often arising in connection with the purchase of stock in corporations. The important principle decided by the case is that as long as a purchaser of stock complies with his contract he is not, either to the company or to the creditors of the company, liable for the fraud of the company, where he is no party to such fraud in their misrepresentations as

to the amount of the capital which has been paid in; so that if false statements in the matter have been made by the company with reference thereto, he is not liable either to the company or its creditors in respect of such fraud, but is liable only to the extent of his contract with the company. The question arose in the following manner: In the judicial winding-up of a limited company the official liquidator presented to the court a petition in which he alleged that certain statements in the articles and memorandum of association with reference to capital there stated to have been paid up were false; that, in fact, no part of the nominal capital had ever been paid up; and he craved the court to make a call per share in excess of the sum which the articles and memorandum of association stated to be the amount of unpaid capital, and to settle the list of contributories so as to include not only the names of original shareholders, but also of certain persons who subsequent to the formation of the company had acquired shares from original shareholders, and who disputed their liability for more than the amount per share which appeared to be unpaid *ex facie* of the articles of association and of the statutory register. In the Scotch court it was held, six of the judges dissenting, that these persons should be placed on the list of contributories, on the ground (1) that the limit of liability depends not on the *bona fides* of purchasers of shares, but on the fact whether, and how far, the amount of capital represented by the shares is paid up or remains unpaid; (2) that an official liquidator is not *eudem persona* with the company, but represents all parties interested; and (3) that for the purpose of enforcing any statutory liability of the shareholders to the creditors of the company, the liquidator represents the creditors. As we have seen, this holding was reversed in the House of Lords, the principle being adopted there, which is an answer to the holding of the majority of the Scotch court, as was laid down by Lord Cairns in *In re Duckworth*, L. R. 2 Ch. 578, that "the liquidator represents the creditors *only because he represents the company*, and *through the company* the rights of the creditors are to be enforced." As Lord Westbury has well put it: "The rights of creditors against the shareholders of a company when enforced by a liquidator must be enforced by him in right of the company. What is to be paid by the shareholders is to be recovered in that right. What is due to the company is

out the fraud, retain the chattels or the goods, and have his action to recover any damages he has sustained by reason of the fraud.¹ But the same principle does not apply to shares of stock in a joint stock company, for a person induced by the fraud of the agents of a joint stock company to become a partner in that company can bring no action for damages against the company whilst he remains in it; his only remedy is *restitutio in integrum*, and rescission of the contract; and if that becomes impossible, by the winding up of the company or by any other means, his action for damages is irrelevant, and cannot be maintained. Thus, H. bought from the City of Glasgow Bank (a co-partnership registered under the Companies' Act, 1862), £4000 of its stock, in Feb., 1877. He was registered as a partner, received dividends, and otherwise acted as a partner thereafter. The bank went into liquidation in Oct., 1878, with immense liabilities, and H. was entered on the list of contributories, and paid calls. In Dec., 1878, H. brought an action against the liquidators, to recover damages in respect of the sums he had paid for the stock; the money he had already paid in calls, and the estimated amount of future calls. He founded his right to relief upon the ground of fraudulent misrepresentations made by the directors and other bank officials to him. He admitted that, after the winding up had commenced, it was too late for him to have rescission of his contract, and *restitutio in integrum*. The Court of Session of Scotland dismissed the action as irrelevant.² On appeal, the House of Lords held, affirming the decision of the court below, that, even although the fraudulent misrepresentations might, if the bank had been a going concern, have entitled him to rescind the contract, rescission being now impossible, as decided in *Oakes v. Turquand*,³ and *Tennent v. City of Glasgow Bank*,⁴ they afforded no ground for

that only which is in fact recoverable by the company. The liquidator, therefore, standing in the place of the company, the question is, has he a right to impeach the memorandum, set aside the articles, reduce the certificate, and recover in right of the company that which the company could not for one moment, as against a *bonâ fide* shareholder, be entitled themselves to recover?" *Waterhouse v. Jamieson*, L. R. 2 Sc. & D. at p. 37. And the decision of the House of Lords, reversing the decision in the Scotch court, was that the liquidator against such *bonâ fide* shareholder has no such right. The decision is far-reaching in its consequences, and is scarcely less applicable in this country, as a general principle relating to corporations and the *bonâ fide* purchasers of stock, than it is in England or Scotland under the Companies Act, 1862. See also *The Mar-*

quis of Abercorn, 27 L. J. Ch. 666; *Ex parte Currie*, 32 L. J. Ch. 57; *Sheffield, &c. Soc.*, 34 L. J. Ch. 593; *Leifchild's Case*, L. R. 1 Eq. 231; *In re Anglesea Colliery Co.*, L. R. 2 Eq. 379; *Ward's Case*, L. R. 2 Eq. 226; L. R. 4 Eq. 189; *Lund's Case*, 27 Beav. 465; *Hyam's Case*, 1 De G. F. & J. 75; *Budd's Case*, 10 W. R. 51; *Accidental & Mar. Ins. Corporation*, L. R. 5 Eq. 22; *In re English Joint Stock Bank*, L. R. 3 Eq. 341; *Anderson's Case*, L. R. 3 Eq. 337; *Needham's Case*, L. R. 4 Eq. 135.

¹ *Per Lord Cairns*, in *Houldsworth v. City of Glasgow Bank*, 5 Ap. Cas. at p. 323.

² *Houldsworth v. City of Glasgow Bank*, Court of Sess. Cas., 4th series, vol. vi. p. 1164; Scot. L. R. vol. xvi. p. 700.

³ L. R. 2 H. L. 325.

⁴ 4 Ap. Cas. 615.

an action against the liquidators ; and, therefore, that the action was irrelevant.¹

¹ *Houldsworth v. City of Glasgow Bank*, 5 App. Cas. 317.

The following principles were considered in this case as concluded by authority: *First*, that an agent acting within the scope of his authority, and making any representation whereby the person with whom he deals on behalf of his principal is induced to enter into a contract, binds his principal by such representation to the extent of rendering the contract voidable if the representation be false, and the contracting party take proper steps for avoiding it whilst a *restitutio in integrum* is possible. *Secondly*, that a corporation is bound by the wrongful acts of its agents no less than an individual, and that such misrepresentation by the agent being a wrongful act, the result of such misrepresentation must take effect in the same manner against a corporation as it would against an individual. *Thirdly*, that if there cannot be a *restitutio in integrum* the contract cannot be rescinded, but must remain in force, whatever right may exist in regard to damages for injury sustained by the party deceived. *Houldsworth v. City of Glasgow Bank*, 5 App. Cas. at p. 331, *per* Lord Hatherley. But, as was laid down by Lord Chelmsford in *Addie v. The Western Bank*, L. R. 1 Sc. & D. 145, where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors in the name of the company seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action of damages for the deceit, such an action cannot be maintained against the company ; and, therefore, the action in that case having been for the reduction of the deeds of transference of the shares, and alternately for damages, it was held that, the suit having been brought against the company, it followed that he could not recover unless he was entitled to rescind the contract.

In the case of *Houldsworth v. City of Glasgow Bank*, in the Scotch court (*supra*), two principles were laid down which are well supported by the authorities

both in England and Scotland, and about the correctness of which there can be no question : (1) that a principal is liable for the fraud of his agent while acting in the principal's business and within the scope of his authority for the principal's benefit ; (2) that this rule applies to the case of an incorporated company acting through the agency of its ordinary directors and manager. *Barwick v. The English Joint-Stock Bank*, L. R. 2 Ex. 259 ; *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394 ; *Jardine v. Carron Company*, 2 Macph. 1101 ; *National Exchange Co. of Glasgow v. Drew*, 2 Macq. 903 ; *Trail v. Smith's Trustees*, 3 Ret. (Sc.) 770 ; *Clydesdale Bank v. Paul*, 4 Ret. (Sc.) 626. And, as was stated in the same case (*Houldsworth v. City of Glasgow Bank*, in the Scotch court), actions founded on the fraudulent representations of agents have been repeatedly sustained against companies and incorporations. Cases last above cited, and *Swire v. Francis*, L. R. 3 P. C. 104 ; *Stone v. City and County Bank*, 3 C. P. Div. 283 ; *Weir v. Bell*, 3 Ex. Div. 238.

The distinction taken is a fine one, within the law of principal and agent, and is to the effect that while a suit against a corporation with respect to shares of that corporation cannot be sustained, for fraudulent misrepresentation by the directors, unless there can be *restitutio in integrum*, yet that for any contract made between the company and another, with respect to any other matter than its shares, the company is responsible, as an ordinary principal would be, for the fraud of its agent. The reason for this distinction, we take it, is even finer than the distinction itself. The principal is only bound for the acts of his agent within the scope of the agency. In the case of purchases of stock from a company, it is rather the purchase of a right to become a member of the company and thus to become a sharer in the acts and contracts of the company, than it is the entering into a contract with the company. It is in cases of contract with a company that the company acts by its agents, and is bound by their acts and representations within the scope of the agency. But, in the selling of the stock, it is, in a sense, merely giving the party a right to become a member of the company, which has a corporate existence, not for the purpose of selling its shares, but for carrying on some specific business. So long then as the contract, so to call it, simply amounts to

Since 1873, A. had appeared on the register of a joint stock banking company as the holder of £6000 of stock. On Oct. 2,

the right of the party purchasing the shares of becoming a member of the corporation, the party, while in a position to make *restitutio in integrum*, by a return of the stock, the mere selling of which was all that was in the power of the company, is, as between himself and the company, entitled to cancel such transaction for the fraud of those acting for the company; the agents having no power by such sale, by their representations, to make the company any further liable than that of having the sale rendered invalid. The selling of the stock is a thing apart from the object for which the company is created. If the company were created for the purpose of buying and selling other stocks than that of the company, those would be simply chattels, and representations made with reference to them on such sales, by the agents of the company, would be representations with reference to contracts of the company, and, as such, binding on the company, within the scope of the agency.

The only ground upon which we think the cases on these different questions can be reconciled, is, that the scope of the agency is very different in the cases where the stock of the company is sold, where the transaction is only the creation of a right to partake in the company's contracts, as distinguished from those cases where the representations of the company's agents are made in connection with the company's contracts, within the scope of its corporate capacity. Lord Cairns, in *Houldsworth v. City of Glasgow Bank*, 5 App. Cas. 323, says: "There is no doubt that according to the law of England a person purchasing a chattel or goods, concerning which the vendor makes a fraudulent misrepresentation, may, on finding out the fraud, retain the chattel or the goods, and have his action to recover any damages he has sustained by reason of the fraud. . . . But does the same rule apply to the case of shares or stock in a partnership or company? We are accustomed to use language as to such a sale and purchase as if the thing bought or sold were goods or chattels, but this it certainly is not. The contract which is made is a contract by which the person called the buyer agrees to enter into a partnership already formed and going, taking his share of past liabilities, and his chance of future profits or losses. He has not bought any chattel or piece of property for himself. He has merged himself in a society, to the property of which he has agreed to contribute, and the property of which, includ-

ing his own contributions, he has agreed shall be used and applied in a particular way and in no other way."

The decision in this case turns upon the peculiar character of the transaction where that which is purchased is the stock of the company, and where the question that is decided is that a man who has been induced, by the fraudulent misrepresentations of agents of a company, to take shares in the company, cannot, after he discovers the fraud, and is unable to make *restitutio in integrum*, recover damages from the company. Lord Blackburn, in commenting on the language used by Lord Chelmsford, above stated by us, says: "I cannot say whether Lord Chelmsford meant to confine his observation to the particular kind of contract then before him, without deciding whether the same doctrine would apply to all kinds of contracts, or whether it was only by accident that he confined his language as he did. There are strong reasons given by the noble and learned lords who have already spoken in this case for holding that when one has been induced by the fraud of the agents of a joint-stock company to contract with that company to become a partner in that company, he can bring no action of deceit against the company whilst he remains a partner in it. There are reasons which would not apply to every case in which a contract has been induced by fraud, as for example, if an incorporated company sold a ship, and their manager falsely and fraudulently represented that she had been thoroughly repaired and was quite seaworthy, and so induced the purchase, and the purchaser first became aware of the fraud after the ship was lost, and the underwriters proved that she had not been repaired and was in fact not seaworthy, and so that the insurance was void when it would be too late to rescind." And Lord Blackburn quotes approvingly from Lord Sland: "The whole question has been very carefully considered in recent cases in England, in which it has been well settled, on principles which I am satisfied are sound, that an incorporation will be answerable in damages for the fraudulent representations of its agents made in the course of the business intrusted to them." *Barwick v. The English Joint-Stock Bank*, L. R. 2 Ex. 259; *Swift v. Winterbotham*, L. R. 9 Q. B. 301; *Mackay v. The Commercial Bank of New Brunswick*, L. R. 5 P. C. 394; *Swire v. Francis*, 3 App. Cas. 106; *Stone v. The City and County Bank*, 3 C. P. Div. 283; *Weir v. Bell*, 3 Ex. Div.

1878, the bank stopped payment. On Oct. 5, the directors issued circulars summoning an extraordinary general meeting to pass a resolution to wind up the company. On Oct. 18, a report made by independent investigators was sent to all the shareholders, which showed that the insolvency of the company was of such an overwhelming character that large calls would have to be made to meet its liabilities. On Oct. 21, A. raised an action for reduction of his contract to take stock, on the ground that he was induced to purchase by the fraudulent misrepresentation of the directors. The summons in this action was served on the company on the same day. On Oct. 22, an extraordinary resolution to wind up the company voluntarily was passed. A. was put on the list of contributories. The first division of the Scotch Court of Session refused the prayer of the petition, holding that the action came too late after the bank had stopped payment and had declared its insolvency.⁴ On appeal to the House of Lords, the

238; *Houldsworth v. City of Glasgow Bank*, 5 App. Cas. 340, 339.

The question is put by Earl Cairns on the peculiar effect of the Winding-up Act on the rights and obligations of the shareholder, and that consideration entered largely into the decision. But where the Winding-up Act does not apply, and where the company is selling its own stock, strictly as a commodity, as the stock of any other company in which it is dealing,—as, for instance, where the stock has been surrendered by a stockholder after some of the calls have been paid, and the stock, under fraudulent misrepresentations by the agent of the company, has been sold for more than its value, the company being solvent,—we see no reason why the purchaser of the stock, who has suffered loss by the fraudulent misrepresentation of the company's agent, could not as well recover against the company, without the *restitutio in integrum*, as in any other case where a right of action would accrue to one against a company for the fraud of its agent, as in the cases above cited. See previous notes containing *dicta* to this effect.

A case analogous to this is decided in the Scotch case of *Howe v. City of Glasgow Bank*, Sc. Rep. 4th ser. vol. vi. p. 1194, where the seller was a third party, and where the purchaser sought to make the company liable for misrepresentation, on the ground that the bank, through its officials, acted as agent for the seller in selling the bank stock belonging to the seller. The court held that the bank was not liable; but on the ground that neither the manager nor the directors had any power whatever to carry

through an agency transaction between third parties which could in any way affect the bank or its shareholders. In the case which we have put, and which is liable to occur in this country, as there would be no question as to the agency, the converse of the holding in *Howe v. City of Glasgow Bank* would seem to apply to such a case, in which the holding would be, "the officials had . . . authority to bind the bank as brokers in the sale of stock," and, therefore, in such a case the bank would be liable. See the following English and Scotch cases in this connection on the questions involved. *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394, 410, 412; *Swire v. Francis*, 3 App. Cas. 106, 114; *Denton v. Great Northern Railway Co.*, 5 E. & B. 860; *Swift v. Winterbotham*, L. R. 8 Q. B. 244; *Swift v. Jewsbury*, L. R. 9 Q. B. 301, 312; *Weir v. Barnett*, 3 Ex. Div. 32; *Weir v. Bell*, 3 Ex. Div. 238; *Reedie v. L. & N. W. Ry. Co.*, 4 Ex. 244, 255; *Hern v. Nicholls*, 1 Salk. 283; *Cornfoot v. Fowke*, 6 M. & W. 358, 373; *Jardine v. Carron Co.*, Court of Sess. Cas. 3d ser. vol. ii. p. 1101; *National Ex. Co. of Glasgow v. Drew*, 2 Macq. 103; *Burnes v. Pennell*, 2 H. L. Cas. 497; *Forth Main Ins. Co. v. Burnes*, Court of Sess. Cas. 2d ser. vol. x. 689; *Traill v. Smith's Trustees*, *Id.* 4th ser. vol. iii. p. 770; *Clydesdale Bank v. Paul*, *Id.* vol. iv. p. 626; *Addie v. Western Bank*, L. R. 1 Sc. & D. 145.

⁴ *Tennent v. City of Glasgow Bank*, Scot. L. R. vol. xvi. p. 238; Court Sess. Cas. 4th ser. vol. vi. p. 554.

decision of the Scotch court was sustained on the ground that the rights of innocent third parties had intervened, and that A.'s action for reduction of his contract was too late to exempt him from liability.¹

Lord Cairns, L. C., in delivering the judgment of the House of Lords, adopted the three propositions laid down by the Lord President in his judgment in the court below, as follows: —

In the first place, a contract induced by fraud is not void, but only voidable at the option of the party defrauded.

Secondly, this does not mean that the contract is void till ratified, but it means that the contract is valid till rescinded.

And, thirdly, the option to void the contract is barred where innocent third parties have, in reliance on the fraudulent contract, acquired rights which would be defeated by its rescission.²

Persons who purchase property and then create a company to

¹ *Ibid.* 4 Ap. Cas. 615.

² Scotch L. R. vol. xvi. p. 241; Court Sess. Cas. 4th ser. vol. vi. p. 558. The principles involved in the case were thus stated by Lord Cairns: "In an ordinary partnership, not formed on the joint-stock principle, it is impossible, as a general rule, for a partner at any time to retire from or repudiate the partnership without satisfying, or remaining bound to satisfy, the liabilities of the partnership. He may have been induced by his co-partners by fraud to enter the partnership, and that may be a ground for relief against them; but it is no ground for getting rid of a liability to creditors. This is the case whether the partnership is a going concern, or whether it has stopped payment or become insolvent. In the case of a joint-stock company, however, the shares are in their nature and creation transferable, and transferable without the consent of creditors; and a shareholder, so long as the company is a going concern, can, by transferring his shares, get rid of his liability to creditors, either immediately or after a certain interval. The assumption is that, while the company is a going concern, no creditor has any specific right to retain the individual liability of any particular shareholder. It is on the same, or on a similar, principle that, so long as the company is a going concern, a shareholder who has been induced to take up shares by the fraud of the company has a right to throw back his shares upon the company without reference to any claims of creditors. He would have a right to transfer his shares without reference to creditors. The company, as a going concern, is assumed to be solvent, and able to meet its engagements, and to

have a surplus; and the company being solvent, its duty to pay the repudiating shareholder what is due to him, and to take the shares off his hands, is an affair of the company and not of its creditors. But if the company has become insolvent, and has stopped payment, then, even irrespective of winding up, a wholly different state of things appears to me to arise. The assumption of new liabilities under such circumstances is an affair not of the company but of its creditors. The repudiation of shares which, while the company was solvent, would not or need not have inflicted any injury upon creditors, must now of necessity inflict a serious injury on creditors. I should therefore be disposed in any case to hesitate before admitting that, after a company has become insolvent and stopped payment, whether a winding up has commenced or not, a rescission of a contract to take shares could be permitted as against creditors." *Tennent v. City of Glasgow Bank*, 4 Ap. Cas. at p. 621.

The principles established in the following cases are in accord: *Addie v. Western Bank*, L. R. 1 Sc. & D. 145; *Smith v. Rees River Co.*, L. R. 4 H. L. 64; *Oakes v. Turquand*, L. R. 2 H. L. 325; *Kent v. Freehold Land, &c. Co.*, 3 Ch. App. 493; *N. Mitchell v. City of Glasgow Bank*, Court of Sess. Cas. 4th ser. vol. vi. p. 420; *A. Mitchell v. City of Glasgow Bank*, *Ib.* 439; *Henderson v. Royal British Bank*, 7 E. & B. 356; *Mixer's Case*, 4 De G. & J. 575; *Clarke v. Dickson*, E. B. & E. 148; *Blake v. Mowat*, 21 Beav. 663; *Venezuela Ry. Co. v. Kisch*, L. R. 2 H. L. 99; *Allin's Case*, L. R. 3 Ch. 493.

purchase from them the property they possess, stand in a fiduciary relation towards that company, and must faithfully state to the company the facts which apply to the property, and would influence the company in deciding on the reasonableness of acquiring it. This principle was adopted in *Erlanger v. The New Sombrero Phosphate Co.*,¹ reversing a decree of Malins, V. C. On appeal to the House of Lords, the decision of the Court of Appeal was sustained.

In this case the facts and circumstances of the original sale and purchase by the parties creating the company were not disclosed to the company, who adopted the purchase without a knowledge of the fact; but, on their becoming subsequently aware that the promoters of the company had themselves been the purchasers of it, at a lower price than the company were to pay for it, the company, on filing a bill to rescind the contract, obtained a decree to that effect. The House of Lords sustained this decree; the only question in the case at all of any doubt existing as to whether the company had a right to the relief sought for was, as to whether there had not been, on the part of the company, such delay in applying for relief as to constitute laches which deprived the company of the title to obtain it. But, with Lord Cairns very doubtful on this point, it was held that the contract could not be sustained.²

¹ 5 Ch. Div. 73.

² *Ibid.*, 3 App. Cas. 1218. The general principles connected with such transactions are concisely stated by Lord Hatherley, at p. 1243, as follows: "There are three particular classes of cases of what the court terms 'fraud' which may be pointed to as having some analogy with, or some bearing upon, the present case. The first is as between vendor and purchaser; the next is as between partner and co-partner; and the third is the case in which an agent for a purchaser receives a gratuity from the vendor. As to the first of these, a vendor need not do what was at one time asserted by this bill, namely, disclose what he has paid in effecting his own anterior purchase before asking an enhanced price from him to whom he seeks to sell the property; but he must not be guilty of any conduct which amounts to unfair concealment on his part of the real facts of the case, which ought in common fairness to be disclosed to a person seeking to purchase or entering into a treaty with him for that purpose. As regards partners, there is no doubt that one partner is bound to exercise *uberrima fides* with regard to any transactions in which the partners may be engaged in common. There is another

class of cases well known in courts of equity which has some bearing upon the case before us, and that is where a person acting as agent for a purchaser—that is to say, for a person who is minded to purchase—receives a gratuity or a bribe of some description from the intending vendor. In that case, again, the courts interfere, and say that a negotiation carried on between the agent for the purchaser and vendor as principal, in which the agent for the purchaser receives benefits or advantages of any kind from the intending vendor, is one which can be impeached, and which would be set aside in a court of equity."

The cases are numerous which show that persons who act on behalf of others forming a company cannot obtain a profit for themselves out of the transaction. *Aberdeen Ry. Co. v. Blaikie*, 1 Macq. 461; *Imperial Merc. Credit Assoc. v. Coleman*, L. R. 6 H. L. 189; *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221; *Fawcett v. Whitehouse*, 1 Russ. & M. 132; *Tyrrell v. Bank of London*, 10 H. L. Cas. 26, 32; *Charlton v. Hay*, 23 W. R. 129; *Cornell v. Hay*, L. R. 8 C. P. 328; *Beck v. Kantorowicz*, 3 K. & J. 230; *Great Luxembourg Ry. Co. v. Magnay*, 25 Beav. 586; *Hichens v. Congreve*, 1 Russ. & M. 150, n.; *Foss v. Harbottle*, 2

In *Block v. Haversham*,¹ a question arose as to the party entitled to receive the dividends on a sale of stock under the following facts. The shares of a company were sold by auction on Aug. 1., and a deposit was paid. By the conditions of sale, the purchase was to be completed on Aug. 29, which, accordingly, was done, and the transfers were signed. The particulars and conditions of sale were silent as to dividends, and, in the mean time, on Aug. 24, a dividend was declared in respect of a period antecedent to the sale by auction. The court held that the completion of the purchase had relation back to the time when the contract was made, which vested from that moment the right to the shares in the purchasers. They purchased the shares on that day and at that time, and at their then value, and when they paid the remainder of the purchase-money at the time fixed for completion they had a complete title to the shares as they bought them on Aug. 1. The purchaser bought at the value before dividend, and if he did not receive it, he would be paying so much more for his shares than he bargained for; and, therefore, the dividend belonged to the purchaser.²

Hare, 461; Paul & Beresford's Case, 33 Beav. 204. On both questions in the case, see *Hickson v. Lombard*, L. R. 1 H. L. 324; *Heymann v. The European Central Ry. Co.*, L. R. 7 Eq. 154; *Parker v. McKeena*, L. R. 10 Ch. App. 96; *Dent's & Forbes's Case*, L. R. 8 Ch. App. 768; *Bagnall v. Carlton*, 6 Ch. Div. 371; *Overend & Gurney Co. v. Gibb*, L. R. 5 H. L. 480; *Gover's Case*, 1 Ch. Div. 182; *Vigers v. Pike*, 8 Cl. & F. 562. But where a seller of property is not acting in a fiduciary capacity, it is open to him to sell his property to a joint-stock company, and to invite persons to form themselves into a joint-stock company to purchase from him, just as it is open to any man to sell to any persons in the world the right to become his partners in any property or undertaking. While not acting in a fiduciary capacity, until the formation of the partnership he is simply a vendor of the wares. He may ask what price he likes, and obtain what price he can, and he is under no obligation whatever to say what price he gave, or has to give, for them in order to complete his title to the goods. *Gover's Case*, 1 Ch. Div. 182, 187. But a promoter of a company is in a fiduciary relation to the company which he promotes or causes to come into existence. If that promoter has a property which he desires to sell to the company, it is quite open to him to do so; but upon him, as upon any other person in a fiduciary position, it is incumbent to make full and fair

disclosure of his interest and position with respect to that property. There is no difference in this respect between a promoter of a company and a trustee, steward, or agent. *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. Div. 73, 118.

¹ 4 Ex. Div. 24.

² Nothing having been said about the dividends, there would seem to be no doubt that the purchaser would be entitled to all dividends declared after the purchase. There is, in fact, as an incident of the contract, a presumption as to the intention of the parties very similar to the presumption in England in connection with the purchases of the home agent who is buying for a foreign principal. The value of stock being affected by the accretion of dividends, the selling price of the stock is necessarily greater or less in proportion to the greater or smaller amount of dividends; and when the stock sells, nothing being said about dividends, it is deemed as of course that all dividends accruing after the sale pass with the stock. The one fact that a sale is made passes to the purchaser—the owner—all the increments, just as the purchaser of female animals takes all their increase following the sale.

It was sought to put the case as analogous to that of a sale of real property where the increments are in the vendor until the completion of the sale; but it was held that the analogy did not hold good. A more strictly analogous case

In *Duncan v. Hill*¹ the plaintiffs, brokers on the London Stock Exchange, were instructed by the defendant, who was not a member of the house, to buy certain shares in various public undertakings for him for the account of July 15, 1870. Subsequently he told the plaintiffs to carry over the shares to the account of July 29. This was done, and the defendant was furnished with an account showing him to be liable to a difference of £1688 19s. On July 18, the plaintiffs were declared defaulters, and, in accordance with the rules of the Stock Exchange, all their transactions were closed, and accounts made up at the prices current on that day, without the knowledge of or any reference to the defendant. The result was that there was a difference against the defendant of £6013 13s. 5d. In an action to recover this sum, the Court of Exchequer held that, the rules of the Stock Exchange, regulating the mode of dealing with defaulters, bound the defendant; that the plaintiffs, though themselves the defaulters, might take advantage of those rules, and that, therefore, they were entitled to recover. On appeal to the Exchequer Chamber, it was held,² reversing this decision, that the defendant was not liable for anything beyond the £1688, there being no implied promise by a principal to his agent to indemnify him for loss, caused, not by reason of his having entered into the contracts which he was authorized to enter into by the principal, but by reason of his own insolvency.³

The usage of the Stock Exchange is that in transactions between members of it there is an implied understanding that, on the purchase of the stock or shares, the buying jobber shall be at liberty by a given day, called the "name-day," to substitute an-

would be that to which we have referred, of the sale or mortgage of female domestic animals, where it has been held that the accessions pass to the buyer or mortgagee. Thus in *Forman v. Proctor*, 9 B. Mon. 124, 126, it was held that a mortgage being upon horses and swine must be regarded as covering and including the produce or descendants of the female animals conveyed by the mortgage, these being incidents to the legal title, and the right of possession vests in the mortgagee for whom the mortgagor holds the possession. Other cases agree with this. See *Kellogg v. Lovely*, 46 Mich. 131; *Thorpe v. Cowles*, 7 N. W. Rep. 649; *Evans v. Merriken*, 8 Gill & J. 39; *Fowler v. Merrill*, 11 How. 375; *Gundy v. Biteler*, 6 Ill. App. 510. In June, 1865, a dividend was declared upon shares held by the testatrix, payable on July 15, 1865, and Jan. 15, 1866. Testatrix died on Dec. 31, 1865. It was held that the January dividend formed part of

the *corpus* of her residuary estate, and did not pass under a bequest of the annual income of such residuary personal estate. *De Gendre v. Kent*, L. R. 4 Eq. 233. See *Lock v. Venables*, 27 Beav. 598; *Bates v. Mackinley*, 31 Beav. 280; *Wright v. Tucket*, 1 J. & H. 266; *Maclaren v. Stain-ton*, 3 De G. F. & J. 202; *Clive v. Clive*, Kay, 600; *Re Maxwell's Trusts*, 1 H. & M. 610.

¹ L. R. 6 Ex. 255.

² L. R. 8 Ex. 242.

³ See, also, *Duncan v. Beeson*, L. R. 6 Ex. 268, n., in the Court of Exchequer; and, reversing their judgment, in the Exchequer Chamber, L. R. 8 Ex. 242; *Sutton v. Tatham*, 10 A. & E. 27; *Pollock v. Stables*, 12 Q. B. 765; *Mollett v. Robinson*, L. R. 5 C. P. 646; *Maxted v. Paine*, L. R. 4 Ex. 203; L. R. 6 Ex. 132; *Hodgkinson v. Kelly*, L. R. 6 Eq. 496; *Grissell v. Bristowe*, L. R. 3 C. P. 112; L. R. 4 C. P. 36.

other person as buyer, and so relieve himself from further liability on the contract, provided such substituted person be one to whom the original seller cannot reasonably except, and that such person accept a transfer of the stock or shares, and pay to the original seller the price. It was held by Bovill, C. J., and Willes and Keating, JJ. (Byles, J., dissenting), that this was not such a general well-known and reasonable custom or usage as could be supported.¹ In this case the plaintiff, the holder of shares in a company called Overend, Gurney & Co., through a broker sold them to the defendant's jobbers on the Stock Exchange. After various sub-sales, the names of four persons were given to the plaintiff's broker as the persons to whom the shares were to be transferred. The plaintiff's broker thereupon prepared four transfers to those persons, and the plaintiff executed them, and the broker delivered them with the shares to the brokers of the proposed transferees, who thereupon accepted the shares, and paid the price to the plaintiff's broker. The transferees not having executed the transfers, or caused them to be registered, the plaintiff remained the registered holder of the shares, and was compelled to pay calls thereon. The Court of Common Pleas held (Byles, J., dissenting), that the defendants were liable under their contract for not having indemnified the plaintiff against the calls. But, on error to the Exchequer Chamber, reversing the decision of the Court of Common Pleas, the court held, with Byles, J., that, as the plaintiff had transferred the shares to the defendant's nominees, and the latter had accepted and paid for them, though they had not executed or registered the transfers, the defendants were released from all further liability on their contract to the plaintiff.²

¹ Grissell v. Bristowe, L. R. 3 C. P. 112.

² Grissell v. Bristowe, L. R. 4 C. P. 36. In dealing with the claim that the usage was bad because it was unreasonable, the court said: "As regards the alleged unreasonableness of the usage, the ground suggested by the counsel for the plaintiff appears to us altogether untenable. There can be nothing unreasonable, any more than unlawful, in a person to whom it is proposed to purchase a particular thing, saying, 'I will agree to buy, provided that, if, when the time for completing the contract arrives, it should suit me to substitute another buyer, able and willing to take my place and perform the contract, I shall be at liberty to do so.' What would not be unreasonable in a single buyer would not be so in a class of persons dealing in a particular commodity; and if, from a long series of dealings, a

habit or usage of always dealing on such an understanding, even when not expressed, should become established, such a usage would no more be unreasonable than such a stipulation would be if introduced expressly into each particular contract. Besides, a usage founded on the general convenience of all parties engaged in a particular department of business, can never be said to be unreasonable." Grissell v. Bristowe, L. R. 4 C. P. at p. 47. There are numerous cases to show that a court of equity would compel specific performance of a contract such as this in reality was, viz., a contract for a sale to A., with a contract superadded to convey to a person who should be named by A., according to the usages of the Stock Exchange. Walker v. Bartlett, 17 C. B. 446; 18 C. B. 845; Shaw v. Fisher, 5 De G. M. & G. 596; Paine v. Hutchinson, L. R. 3 Eq. 257; L. R. 3 Ch. App.

Where jobbers buy stock on the English Stock Exchange and give the vendors the name of an infant as a transferee, on the winding up of the company, and the removal of the name of the infant transferee, the factors are liable to indemnify the vendors against all liability in respect of the shares.¹

By the usage of the London Stock Exchange, stockbrokers who have entered into contracts for the purchase of stock, are, in the event of the insolvency of their principal, justified in immediately selling the stock. A principal is insolvent within the meaning of this rule, when he is unable to pay his debts in the ordinary course of business. And, in equity, an agent is entitled to be indemnified against liability, as well as loss, incurred on behalf of the principal.²

W. D., one of the seven persons who subscribed the memorandum of association of a company, to work a certain concession, agreed to take one hundred shares. A recital of the articles of association was that E., who assigned the concession to the company, had agreed to cause to be allotted to the persons subscribing the articles, shares to be deemed fully paid up, and the fifth article stated that the shares of each subscriber of the memorandum should be allotted to him as fully paid up, and that a competent number of shares should be allotted to E. in pursuance of the arrangement which had been previously come to. The company was registered on Sept. 22, 1865, and on that day the directors issued to E., for work already done, etc., £50,000 in debentures, and 4000 shares. W. D. was a director. On Oct. 3, 1865, E. requested the secretary to place shares of the 4000 in the

388; *Hawkins v. Maltby*, L. R. 4 Eq. 572; L. R. 3 Ch. App. 183; *Evans v. Wood*, L. R. 5 Eq. 9; *Sheppard v. Murphy*, 16 W. R. 948, 955; *Hodgkinson v. Kelly*, *Id.* 1078; *Coles v. Bristow*, L. R. 6 Eq. 149; L. R. 4 Ch. App. 3; *Viscount Torrington v. Lowe*, L. R. 4 C. P. 26; *Cruse v. Paine*, L. R. 6 Eq. 641.

¹ *Heritage v. Paine*, 2 Ch. D. 594. The law on this point was settled, in accordance with the above, in *Nickalls v. Merry*, L. R. 7 H. L. 530, stated *supra*, p. 322, which the case of *Heritage v. Paine*, 2 Ch. Div. 504, followed. A party purchasing stock in the name of an infant is himself liable as a contributor. *In re Imperial Credit Association*, *Richardson's Case*, L. R. 19 Eq. 588.

² *Lacey v. Hill*, *Crowley's Claim*, L. R. 18 Eq. 182. On this latter point the court said: "Last of all, it is said this is a liability as distinguished from an actual payment, and that the agent or person entitled to be

indemnified has no remedy. It is not very material to consider whether he is entitled to have that sum paid to him, or whether it must be paid direct over to the creditor. If the creditor is not a party, I believe that it has been decided that the party seeking indemnity may be entitled to have the money paid over to him. As to the observation that he may compromise for less, the answer is, that the person liable to indemnify can go to the creditor and set him right. It is his own fault that the liability remains. But he is certainly in equity liable to indemnify, and liable to indemnify to the extent of the liability incurred by the agent on his behalf." *Ibid.* L. R. 18 Eq. 191. See *Scrimgeour's Claim*, L. R. 8 Ch. 921, as to the authority of the brokers to sell the stock. See, on the question of indemnity, *Cruse v. Paine*, L. R. 6 Eq. 641; *Duncan v. Hill*, L. R. 8 Ex. 242; *Parker v. Lewis*, L. R. 8 Ch. 1035, 1058; *Collinge v. Heywood*, 9 A. & E. 633.

names of the persons mentioned; W. D. being one of them, for one hundred shares. The company was afterwards ordered to be wound up. The official liquidator placed the name of W. D. on the list of contributories in respect of the one hundred shares for which he subscribed, and on summons asking that a call of £3 a share might be made. Held, that W. D.'s name had been rightly placed on the list, and that he must pay the call, and that it was not competent to persons who had bound themselves by the memorandum to take and pay for shares, to introduce an article into the articles of association to the effect that they should not be called upon to pay anything.¹

An application for shares in a false name puts the applicant in the same position, as regards liability, as a transfer in a false name; and, in both cases, the name of the applicant will be substituted for the false name. This principle was acted on in the following case: S., who was a large shareholder in a company, wished to take more shares, but the directors refused to allow his name to appear for any larger number. He then, at the suggestion of the secretary, and with the concurrence of a local agent of the company, sent in an application for shares signed by his daughter P., a married woman residing elsewhere, but then on a visit to him. Her condition was not stated in the application, and the father's residence was given. The deposits on application and allotment were paid by S., and he received the notice of allotment and a dividend, which was paid, and all the notices relating to the company, which were posted to P. at his address. P. signed the application without being informed or knowing what it was, and never told her husband anything about it, and neither of them knew that she was on the list till an application was made by the official liquidator. It was held that the case was similar to that of an application for shares in the name of a fictitious person, and that the name of S. must be substituted for P. in the list of contributories.²

¹ *In re Anglo-Moravian Hungarian Junction Railway Company*, Dent's Case, L. R. 15 Eq. 407. Sir W. James held that W. D. having bound himself by the memorandum of association to take shares and to pay for them, it was not competent to introduce an article into the articles of association, which in fact and in terms says that, notwithstanding he did undertake, by subscribing the memorandum and the articles of association, to take and pay for the shares, he should not be called upon to pay for them. See *Pell's Case*, L. R. 5 Ch. 11; *Drummond's Case*, L. R. 4 Ch. 772; *Jones' Case*, L. R. 6 Ch. 48.

² *In re Hercules Insurance Co.*, Pugh

& Sharman's Case, L. R. 13 Eq. 566. The court decided that it was clear that the daughter's name had to be taken off the list, and that the case was the same as though S. had been originally put upon the list of contributories, and he had attempted to get rid of his liability by transferring the shares into the name of a person who was incapable of accepting such a transfer, and that, therefore, his name should be substituted for that of his daughter. See *Hemming v. Maddick*, L. R. 7 Ch. 395; *Musgrave & Hart's Case*, L. R. 5 Eq. 193; *Nickalls v. Fermeaux*, cited in *Pugh & Sharman's Case*, L. R. 13 Eq. 569.

Where a party buys shares under a fraudulent misrepresentation which would entitle him to be relieved from them, on a prompt application on his obtaining knowledge of the misrepresentation, yet when he sleeps on his rights and is guilty of laches, he will lose the benefit of his position, and will be held liable as a shareholder to the creditors of the company.¹

A., through his broker, sold shares to a jobber, from whom B. had agreed to purchase the same number of shares, giving the name of C., one of his workmen, as the person to whom the shares were to be transferred. A. executed the transfer to C., and afterwards received the purchase-money; but, from the winding up of the company, the transfer was not registered, and the shares still remained in the name of A. Held, that B., as the real purchaser and equitable owner, was bound to indemnify A. against all calls in respect of the shares.²

Where fraudulent misrepresentation in a prospectus on the faith of which shares had been taken, was discovered by a shareholder, who thereupon repudiated his shares; but, owing to the company and himself having awaited the result of suits by other shareholders similarly situated, he took no steps to be relieved of his liability, it was held that, under the circumstances, he was not guilty of laches, and was not a contributor.³

Where shares in a company had been transferred into the name of an infant, who attained twenty-one after a winding-up order had been made, and was placed on the list of contributories; it appearing that, though he had not repudiated the shares, he had done no act of acquiescence, except that solicitors had attended at chambers on behalf of himself and of others in opposition to an order for a call; it was held that such appearance did not amount to confirmation, and that he was entitled to have his name removed from the register of shareholders.⁴ And where a transfer of shares in a company, before a resolution to wind up voluntarily, was made to an infant who did not attain twenty-one till after the resolution, the transfer was held void at the instance of the liquidator, though the infant, after attaining twenty-one, expressed

¹ *In re London & Mediterranean Bank, Wright's Case*, L. R. 12 Eq. 331.

² *Castellan v. Hobson*, L. R. 10 Eq. 47. The case was decided on the ground that, the shares remaining in the name of A., after his sale to B., A. was a trustee for B., to whom he had sold, and that B. was bound to indemnify his trustee for his liability as such. See *Evans v. Wood*, L. R. 5 Eq. 9; *Hawkins v. Maltby*, L. R. 4 Ch. 202, 203; *Sheppard v. Murphy*, 16 W. R. 948; *Coles v. Bristowe*, L. R. 4 Ch. 3.

³ *In re Estates Investment Co., Mc-Niell's Case*, L. R. 10 Eq. 503. See *Ashley's Case*, L. R. 9 Eq. 263; *Ross v. Estates Investment Co.*, L. R. 3 Eq. 122; *Pawle's Case*, L. R. 4 Ch. 497.

⁴ *In re Commercial Bank Corporation of India and the East, Wilson's Case*, L. R. 8 Eq. 240. The court held that there must be some distinct act shown on the part of the applicant to make him liable, and that solicitors appearing for him to oppose a call was neither a confirmation nor acquiescence.

a desire to retain the shares.¹ But, when there were laches on the part of the company in permitting an infant's name to remain on the register for nearly three years after they became aware of his infancy, without informing his transferor of the fact, they were not entitled to substitute the name of the transferor for that of the infant, on the list of contributories.²

A. bought of a jobber on the Stock Exchange shares in a company, and afterwards, the company in the mean time having stopped payment, B. sold to another jobber on the Stock Exchange shares in the same company at a lower price for the same settling day. On the name-day, A.'s name was given to B., as the purchaser of B.'s shares; B. executed a transfer of the shares to A., and delivered the transfer and certificates to A.'s broker, who paid him the price for which A. purchased the shares. A. afterwards repaid his own broker, and took away the transfer and certificates, but did not execute the transfer, and it was never registered. It was held that A. was liable to indemnify B. against all consequences flowing from the ownership of the shares subsequent to the execution of the transfer, and that this liability arose from the nature of A.'s original contract, according to the custom of the Stock Exchange, by which the buyer or seller of shares undertakes to buy or sell from or to the person whose name is given to him on the name-day.³

Where the liquidators of a company seek to place on the list of contributories a person as the holder of shares, and he objects, on the ground of his having transferred the shares, it is incumbent on him to show that at some time or other there was on the register a transferee of his who could be made liable at law in respect of the shares. Hence where ten shares were standing on the register of a company, in the name of an infant, upon the company being wound up, the court, on the application of the liquidators, removed the name of the infant from the register in respect of the shares, and substituted that of the transferor; although the ten shares originally formed part of a batch of eighty shares which

¹ *In re Continental Bank Corporation*, Castello's Case, L. R. 8 Eq. 504. The status of the transferee at the date of the transfer and of winding up was that of an infant. There must be a transferee on the register, to be binding on the company, who can be made liable in respect of the shares transferred. *Curtis's Case*, L. R. 6 Eq. 455; *Lumsden's Case*, L. R. 4 Ch. 31.

² *In re European Central Railway Co.*, *Parson's Case*, L. R. 8 Eq. 656. In this case the company had knowledge of the infancy, but the transferor had not. In an action for calls, the infant pleaded infancy in answer, and they gave no notice to the

transferor. In *Capper's Case*, L. R. 3 Ch. 458, notice was given to the transferor that the transferee was an infant, and the transferor was held liable. See *Mann's Case*, L. R. 3 Ch. 459, 460, n.; *Lumsden's Case*, L. R. 4 Ch. 31, 33.

³ *Hodgkinson v. Keely*, L. R. 6 Eq. 496. See *Grissell v. Bristowe*, L. R. 3 C. P. 112; and, on appeal, L. R. 4 C. P. 36; *Cruse v. Paine*, L. R. 6 Eq. 641; *Hawkins v. Maltby*, L. R. 3 Ch. 188; *In re London & Provincial Starch Co.*, *Gowder's Case*, L. R. 6 Eq. 77; *Evans v. Wood*, L. R. 5 Eq. 9.

had been purchased on behalf of the infant, all of which eighty shares had, prior to the winding up, been sold by the infant, the purchase-money received, and the transfers executed by all the purchasers, and the transferees of all, except the ten shares in question, entered on the register of shareholders.¹

An infant shareholder in a company attained her majority six months after the commencement of the winding up of the company, and, after due notice, she was settled on the list of contributories. More than a year after the filing of the certificate of the settlement of the list, but within three months after she received notice of it, and nearly three years after she attained her majority, she applied to have her name removed from the list, which was ordered accordingly, but without costs.²

By the practice of the London Stock Exchange, the property in shares when sold on the exchange is considered to pass from one member to the other by force of the contract, without the execution of any transfer, until the settling day arrives, when the broker of the original vendor calls upon the broker to whom he has sold, to name the purchaser, and the name so furnished is inserted in the transfer deeds; the first purchaser paying to the original vendor, if the shares have fallen, the difference between the original selling price and the ultimate purchaser's price. But, where plaintiff sold shares, of which the defendant became the ultimate purchaser, but, between the original selling by the plaintiff and the final purchasing by the defendant, a call had been made, of which the defendant when he purchased was unaware, the Vice-Chancellor, on this ground, held, that the plaintiff could not enforce an equitable title against the defendant.³ On appeal,⁴ the decision on this ground was reversed, but the appeal was dismissed, as it was held that the contract alleged by the bill was not proved. On a new bill filed,⁵ the fact of the call was not considered material connected with the other facts of the case.⁶

A. sold to N., a stock-jobber, and B. purchased from N. five

¹ *In re Imperial Mercantile Credit Assoc.*, *Curtis's Case*, L. R. 6 Eq. 455. This case was concluded by *Mann's Case*, L. R. 3 Ch. 459, n., where an infant was allowed to repudiate twenty out of one hundred shares held by him. If the court sees that it is not for the benefit of the infant, the infant's name will be taken off, and that of the transferor substituted for it. *Reid's Case*, 24 Beav. 318.

² *In re Alexandra Park Co.*, *Hart's Case*, L. R. 6 Eq. 512. It was held that she had not waived her rights. The case followed *Shewell's Case*, L. R. 2 Ch. 387, where it was decided that a person's allowing his name to remain for a length of

time on the list of contributories without making any objection, does not raise an equity against his applying to have it removed, where no loss is sustained by the estate which would have been avoided if the application had been made earlier.

³ *Hawkins v. Maltby*, L. R. 4 Eq. 572.

⁴ L. R. 3 Ch. Ap. 188.

⁵ L. R. 6 Eq. 505, affirmed on appeal, L. R. 4 Ch. Ap. 200.

⁶ The court was of the opinion, that as the purchaser knew that the shares were sold subject to the possibility of a call being made, and as, after the call was made, he allowed the matter to remain for

shares in a joint stock company. According to the practice of the Stock Exchange, N. gave to A. the name of B. as the purchaser, and a transfer of the shares from A. to B. was executed by A. and B., and the purchase-money was paid by B. to A.; but B. was prevented by accidental absence from home from sending the transfer for registration until after the company had stopped payment. The company was wound up, and the liquidators registered all transfers left at the office before the company stopped payment, but refused to register the transfer from A. to B., and A. was made a contributory, and paid a call on the shares. It was held, that A. was entitled to a decree against B. for repayment of the call, and indemnity against future liability in respect of the shares; and, that, where the directors of a company have a discretionary power of refusing to register transfers if they disapproved of the transferee, and a transfer, executed before, was not left for registration until after the commencement of the winding up of the company; it would be presumed, in the absence of evidence that the transferee was objectionable, that the directors would have registered the transfer;¹ distinguishing this case from that of *Birmingham v. Sheridan*,² relied on for the defendant, where it was held, and considered rightly so, that where it was impossible for a person to be put on the register, the contract could not be carried into execution, because part of the contract was, that the name of the purchaser should be put upon the register, and that part could not be performed. But this case differs from that, for this reason that the defendant, not from any intentional misconduct on his part, but owing to his accidental absence from home, did not send up the transfer to be registered before May 11, which if he had done it would have arrived in time, and would have been duly registered, at all events, by the liquidator, who would have had authority to register it; but as it came up too late it could not be registered, and the liquidators had no power or authority to register it.³

four months without taking any step to repudiate the transaction, he was liable as the purchaser. See *Prendergast v. Turton*, 1 Y. & C. Ch. 98; *Clegg v. Edmondson*, 2 De G. M. & G. 787; *Shepherd v. Gillespie*, L. R. 5 Eq. 293; 3 Ch. 764. As to the question of contract between the parties, that was settled by *Coles v. Bristowe*, L. R. 4 Ch. 3. See *post*, where the case of *Hawkins v. Maltby*, L. R. 4 Ch. Ap. 200, on appeal, is more fully stated.

¹ *Evans v. Wood*, L. R. 5 Eq. 9.

² 33 Beav. 660.

³ The court said: "Now, I can hardly call that laches, because a man cannot be blamed for being absent from home on

business for twenty-four hours; but still, if any evil consequences follow from that absence, they must fall upon himself. A court of equity does not treat it as a case of laches for which a man should be punished; but the question is upon whom the injury occasioned by the absence is to fall? If the defendant had been at home, the registration of the transfer would have been duly made. He was not at home; and the consequence is, whether his absence was accidental or intentional, that he cannot get any benefit from his absence; but the parties must be put in the same situation as if he had been at home, and the delay had not taken place." See

The question of the effect of the non-communication of the allotment of shares was decided in *In re National Savings Bank Association, Hebb's Case*.¹ On Aug. 28, 1857, H. signed and gave to the agent of the company at Lincoln, an application on a form provided by the company, and, at the same time, paid to the agent a deposit of 5s. per share, for which the agent gave him a receipt, with a memorandum that a duly authorized receipt would be forwarded from the head office within eight days. On Sept. 4, 1857, the directors allotted ten shares to H., and entered his name in the allotment book, and, on the same day, sent to their agent at Lincoln, the letter of allotment with a receipt for the deposit signed by two directors, but the agent did not deliver the letter and receipt to H. until Sept. 9. In the mean time, H. wrote a letter to the directors, withdrawing his application, and requesting the return of the deposit. On Aug. 26, 1858, H. having insisted upon repudiating the allotment and threatening to sue the company for the deposit, the directors repaid him the deposit. The allotment was not formally cancelled, and H.'s name remained on the register, but he had no further communication from the company until June, 1866, when the company was ordered to be wound up. It was claimed that the contract was complete as soon as the shares were allotted; that the directors could not, either as against the applicant or as against the other shareholders, have recalled the allotment, whether or not it had been notified to the applicant, and that H. might, at any time after Sept. 4, 1858, have enforced specific performance. *Dunlop v. Higgins*,² in which it was held that a contract was complete as soon as a letter was posted accepting the offer, was relied on. The court (Lord Romilly, M. R.), dissented from this contention; deciding that if a person applies for shares in a company, and the directors write down his name in the allotment book, they may, at any time before the allotment has been communicated to the allottee, alter or cancel the allotment. Applications for and allotments of shares are to be treated on the same principles as ordinary contracts between individuals. The party to whom the application is made is not bound by communicating the acceptance to his own agent. Thus, if A. writes to B. offering to buy land of B., for a certain sum of money, and B. accepts the offer, and sends his servant with a letter containing his acceptance, until A. receives the letter, A. may withdraw his offer, and B.

Walker v. Bartlett, 18 C. B. 845; *Wynne v. Price*, 3 De G. & Sm. 310; *Shaw v. Fisher*, 5 De G. M. & G. 596; *Paine v. Hutchinson*, L. R. 3 Eq. 257; *Poole v. Middleton*, 29 Beav. 646; *Chapman v.*

Shepherd, L. R. 2 C. P. 223; *Burnett v. Lynch*, 5 B. & C. 589; *Emmerson's Case*, L. R. 1 Ch. 433.

¹ L. R. 4 Eq. 9.

² 1 H. L. Cas. 381.

may stop his servant on the road and alter the terms of his acceptance, or withdraw it altogether. Lord Romilly distinguished this case from that of *Dunlop v. Higgins*, on the ground that, the post-office being the common agent of both parties, the posting of a letter accepting an offer constitutes a binding contract. It was accordingly held, that, H. not having agreed to accept the shares, there was no contract.¹

There were negotiations for an amalgamation of the P. company with the U. company, and W., who was a paid-up shareholder in the P. company, made an application to the U. company in pursuance of the amalgamation, for paid-up shares of the same value as his former shares. He received a letter of allotment, signed by a person professing to be the managing director of the U. company, giving him notice that the directors had allotted him the number of shares applied for, on which he was to be credited with an amount proportionate to the assets of the P. company. There was no evidence on what authority this letter was written, but W.'s name was placed on the register as an ordinary shareholder. W. received the letter at the end of August, while he was on a yachting cruise, and, on his return to London, early in October, applied personally to the chairman and solicitor of the company for an explanation of the letter, and objected to take the shares, but was informed by them that his name was not on the

¹ If the applicant had authorized the agent of the company to accept the allotment on his behalf, there would have been a binding contract; but as he gave no such authority, and as he had withdrawn his original offer before he received the letter of the directors, the position of the parties was changed, and the letter became an offer which required his acceptance to constitute a binding contract. *Hebb's Case*, L. R. 4 Eq. 12. An offer does not bind the person who makes it until it has been accepted, and its acceptance has been communicated to him or his agent. In *Martin v. Mitchell*, 2 Jac. & W. 413, 428, Sir J. Plumer said: "Where one party having entered into a contract that has not been signed by the other afterwards repents and refuses to proceed in it, I should have felt great difficulty in saying that he had not a *locus penitentie*, and was not at liberty to recede until the other had signed, or in some manner made it binding upon himself. How can the contract be complete before it is mutual? And can it be complete as to the one and not to the other?" In the case of *Dunlop v. Higgins*, 1 H. L. Cas. 381, the offer was received by post, and the acceptance of the offer was com-

municated in the same way. So, in *Adams v. Lindsed*, 1 B. & Ald. 681, the offer was by mail, and was made subject to receiving an answer by post. In all such cases the post-office is made the agent of the first party to receive the acceptance, and the contract is held to be completed when the letter accepting the offer is mailed. In this last-named case it was claimed that until the answer was actually received there could be no binding contract between the parties. But the court said, that if that were so, no contract could ever be completed by mail. For if the defendants were not bound by their offer, when accepted by the plaintiffs, till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The party making the offer must be considered in law as making, during every instant of the time the letter is travelling, the same identical offer to the other party; and then the contract is completed by the acceptance of it by the latter. See further, in a later volume of this work, on Contracts by Letter.

register. On Oct. 15, he wrote to the secretary, formally repudiating the shares. On Nov. 9, the U. company was wound up on a petition presented on Oct. 7. It was held, on appeal, reversing the decision of Bacon, V. C., that there was no contract between W. and the company to take shares, and, that, under the circumstances, W. was not bound to take shares in the company; and his name was, therefore, removed from the list of contributories.¹

If A. sells shares in a company to a member of the Stock Exchange, and B. buys shares in the same company, at a different price, from another member of the Stock Exchange, and, on the same day, B.'s name is given to A. as the purchaser of A.'s shares, and A. executes a transfer of his shares to B., and B. accepts the transfer and pays to A. the price for which B. originally bought the shares, the transaction constitutes a contract between A. and B., for the sale and purchase of the shares, which a court of equity will compel B. specifically to perform.²

On the instructions of W., shares in a company subsequently wound up were purchased for him by a broker, who, on the settling day, also on the instructions of W., gave the name of G. as the purchaser, and the deeds of transfer were made out in G.'s name and delivered to him for execution, and he for some time retained possession of and dealt with them. W. informed G. that he had passed his name as transferee, and had also passed a cheque on the company's bankers for the purchase-money to the debit of his firm. G. took no step to inform the vendor that he did not assent to the contract, though he did express his dissent to W. Held, that the vendor was entitled to a decree for specific performance against G.³

¹ Wynne's Case, *In re* United Ports and General Insurance Company, L. R. 8 Ch. Ap. 1002. In this case there was no contract between the parties; there was an offer, but no acceptance of the offer. See Shackleford's Case, L. R. 1 Ch. 567; Dougan's Case, L. R. 8 Ch. 540. An agreement to place shares, even although the person making it binds himself that within a specified time, or within a reasonable time, he will place a certain number of shares, is a materially different thing from an agreement to take a certain number of shares. If a person agrees to take shares, then by so agreeing he becomes at that moment a shareholder, and the company are entitled, and are indeed bound, at that moment to put him on the register. But if he agrees to place shares he does not agree to become a shareholder, nor are the company entitled to put him on the register as a shareholder, but he simply agrees that he

will procure other persons to take the shares. While he might be liable for his breach of contract to place the shares, this would not place upon him the liability of a shareholder in case of the winding-up of the company. Gorrisen's Case, L. R. 8 Ch. 507.

² *In re* Overend, Gurney & Co., Musgrave & Hart's Case, L. R. 5 Eq. 193. See Marino's Case, L. R. 2 Ch. 596; Wynne v. Price, 3 De G. & Sm. 310; Paine v. Hutchinson, L. R. 3 Eq. 257; Budd's Case, 3 De G. F. & J. 297.

³ Shepherd v. Gillespie, L. R. 5 Eq. 293. The principle on which this case was decided is that it is essential to the right to enforce a contract that there should be sufficient testimony of the assent of the contracting parties. An assent which is to be implied from conduct may be as binding as an express assent. Where a man who has a title, and knows of it,

In *Bridger's Case*, *In re General Provident Assurance Co.*,¹ B., the local agent of an insurance company, being requested by the manager to take shares in order to induce other persons to become shareholders, offered to apply for 100 shares on condition that he should not be called upon to pay anything for the shares, but that all payments on the shares should be deducted out of his commission on shares sold by him, and upon being told by the manager of the company that he would "be allowed the privilege of paying them up as convenient," he sent in a formal application for 100 shares, which were duly allotted, and he was informed of the allotment, and was registered as the holder of the shares, but he never paid any money on application or allotment, or any calls. His commission was insufficient to pay for the shares. It was held that he had entered into an absolute contract to take the shares, with a collateral agreement as to the effect of taking them which did not prevent him being made a contributory; and, also, that having allowed his name to be registered as a shareholder to induce other persons to take shares, he was precluded from denying himself to be a contributory.²

In *Wallis's Case*, *In re Peruvian Railway Company*,³ Wallis applied for 200 shares of stock, at the instigation of J. P., the managing director of the company. The company allotted 60 shares to Wallis, but no notice was sent to him or to J. P., but E. P. had notice of the allotment. The court below confounded the two names of J. P. and E. P., and, holding that E. P. was agent for Wallis to accept the shares allotted, held that Wallis was liable as a contributor. It was held, on appeal, that this was wrong, and that Wallis, neither by himself or his agent having received notice of the allotment, was not liable.

The cases of *Crawley* and of *Robinson*, *In re Peruvian Railway Company*,⁴ differ from *Wallis's Case* in some respects. In

stands by and either encourages or does not forbid the purchase, it is the doctrine of equity that he and all claiming under him are bound. 1 Fonbl. Eq. 163. A contract for sale so far completed as that the vendor has executed the conveyance and received the purchase-money, can only be annulled or altered by the contracting parties. *Shepherd v. Gillespie*, L. R. 5 Eq. 293. See *Pickard v. Sears*, 6 A. & E. 469, 474; *Duchess of Kingston's Case*, 2 Sm. Lead. Cas., 6th ed., 769.

¹ L. R. 9 Eq. 74, affirmed on appeal, L. R. 5 Ch. Ap. 305.

² The deliberate representation by B. to others that he was a shareholder, when, according to his own view, he was not really a shareholder, for the purpose of

inducing them to take shares, was a false representation, which as between himself and the other shareholders precluded him from the right to deny that he was what he represented himself to be. *Bridger's Case*, L. R. 9 Eq. 74, 80. For cases of conditional contracts, see *Shackleford's Case*, L. R. 1 Ch. 567; *Roger's Case*, L. R. 3 Ch. 633; *Pellatt's Case*, L. R. 2 Ch. 527; *Oriental Inland Steam Co. v. Briggs*, 4 De G. F. & J. 191. See *Elkington's Case*, L. R. 2 Ch. 511, 522; *Thomson's Case*, 34 L. J. Ch. 525; *Harrison's Case*, L. R. 3 Ch. 633; *Langer's Case*, 37 L. J. Ch. 292.

³ L. R. 4 Ch. Ap. 325, n.

⁴ L. R. 4 Ch. Ap. 322.

Crawley's Case the facts were very similar to those in Wallis's Case. The point in which they differed was that although Crawley, not having received the notice of allotment, might have repudiated the shares, yet, as subsequently to their allotment he executed a transfer of them, he thereby affirmed the contract.¹

Robinson's Case goes a step farther than Wallis's Case. In this case, Robinson applied for shares in Company A., at the instance of E. P., the managing director of Company B., who gave him a letter on behalf of Company B., indemnifying him against all responsibility. Robinson then sent in the application for the shares, and paid the deposit by a cheque on his own banker, although the money was supplied by Company B. The shares were allotted to Robinson, and his name was placed on the register. No notice of allotment was sent to him, but the notice was sent to the office of Company B., of which E. P. was the managing director. Company A. being afterwards wound up, it was held (reversing the decisions of *Malins, V. C.*), that there was no contract to take the shares, and that, therefore, Robinson was not liable as a contributor.²

Levita's Case, *In re International Company*,³ was a case where shares were allotted to L. without his knowledge, on the application of M. Afterwards L., at M.'s request, sent in a formal application for the shares. No notice of allotment was sent to him. M. paid the deposit on the shares and received the share certificates, and also a dividend which was subsequently declared. L.'s name was on the register when the company was ordered to be wound up. It was in this case held (affirming the decision of *Stuart, V. C.*), that L. had constituted M. his agent to accept the shares, and that he was properly placed on the list as a contributor of the company.⁴

In all these cases, the ordinary principles as between principal and agent; acquiescence or repudiation of the agent's acts, and recognition or refusal to adopt the contract of the agent, apply as in other cases of sales, or as in any other contracts.

¹ It was similarly held in *Levita's Case*, L. R. 3 Ch. 36, where a man knew he could not act as director unless shares had been transferred to him, and he made an application for the shares, and then afterwards attended the board of directors and acted as a director, that that was a strong circumstance to show that he knew the shares were allotted to him. See the *Marquis of Abercorn's Case*, 10 W. R. 548; 8 Jur. N. s. 951, where the shareholder, although elected a director at his own request, but never having acted as such, was not liable for the amount of stock

necessary to qualify him as a director, he, in fact, not owning that amount of stock, although without his consent it had been allotted to him.

² There was nothing in the case to show that Company A. either by itself or its agents was authorized to communicate on Robinson's behalf with Company B. so as to bind him, and, therefore, as no notice of allotment had been sent to him, he was held not liable. *Robinson's Case*, L. R. 4 Ch. 322, 330.

³ L. R. 5 Ch. Ap. 489.

⁴ The court held in this case, distin-

Lord Cairns, L. J., in *Pellatt's Case*,¹ lays down the doctrine that where a person applies for shares in a company, there is in general no binding contract to take shares until the company have communicated to him an allotment of shares; the decision in *Bloxam's Case*² being referable to its special circumstances. In *Pellatt's Case*, the application for the shares made by the party applying was subsequent to the matter having been arranged between the promoter of the company and the subsequent applicant, but this did not render the allotment of the shares, and the due notice thereof, any the less necessary in order to complete the contract for the shares. On the argument, Lord Cairns, referring to *Bloxam's case*, said, *that there* — “There had been a conversation in which *Bloxam* was informed that if he did not receive an answer within a certain time, he was to consider his application granted. But in the ordinary case, where a person applies for the maximum number of shares, undertaking to accept them, or any less number, and the company is under no obligation to give him any, is not a reply to the application necessary?” And, on the facts in the case as stated, he subsequently held as above.³

In this connection, we refer to a case decided in the Supreme Court of Canada. *Nasmith v. Manning*⁴ is a case on the allotment of shares, of very great simplicity, but it is one over which the Canadian courts struggled almost helplessly and hopelessly. It was held, on the facts of the case, by three judges, in the Court of Queen's Bench of Ontario, that the contract was complete, and that the defendant was liable for the stock for which he had subscribed. On appeal to the Court of Appeal for that Province, it was held by three judges, the fourth judge *contra*, that the defendant was not liable. On further appeal to the Supreme Court of Canada, the court again divided, and it was held, this time by three judges to two, that the judgment of the Court of Appeal was right. It was conceded in the case that there was no evidence of notice of allotment having been given to the subscriber (the defendant in the case) for the shares, but it was claimed by the two dissenting judges in this court (*Ritchie, C. J., and Gwynne, J.*), that this was not necessary; that there was a completed contract without it.

guishing it from *Robinson's Case* (*supra*), that it was as clear as possible that L. intended M. to be his agent for all purposes in connection with the transaction.

¹ L. R. 2 Ch. Ap. 527, 535.

² 33 Beav. 529; 12 W. R. 995.

³ See also *Cookney's Case*, 3 De G. & J. 170; *Yelland's Case*, 5 De G. & Sm. 395; *Elkington's Case*, L. R. 2 Ch. 511. This last case was distinguished from *Pellatt's Case*, L. R. 2 Ch. 534, by Lord Cairns,

thus: “The circumstances are somewhat similar to those of *Elkington's Case*, but there are material differences between them. In *Elkington's Case* the agreement was constituted by an actual application for and allotment of shares, followed by acceptance of them, by which agreement Messrs. *Elkington* were made shareholders.”

⁴ 5 S. C. of Can. R. 417.

By the language in the stock-book, signed by the defendant, under the unusual solemnity, in stock-books, of a seal, the defendant agreed to become a holder of fifty shares of stock of the T., G. & B. Company, and, it was further provided that, "*upon the allotment by the said company of my or our said respective shares, we severally and respectively agree to pay to the said company ten per centum of the amount of the said shares respectively, and to pay all future calls that may be made on the said shares respectively.*" This is the ordinary case of a contract to take shares in a company on allotment; the subscriber to become a shareholder only when the other party to the contract, the company, shall have bound itself to a specific contract, by allotting the shares and notifying the subscriber of having so done. In this case, to make this even more than usually apparent, the company had not, in fact, been really organized at all, much less had it bound itself to the subscriber by any definite contract, under its seal, or in any other way. Singularly, too, in justifying the holding of the two minority judges, Ritchie, C. J., quotes the following language: "When an individual applies for shares in a company, and there is no obligation to let him have any, there must be a response by the company; otherwise there is no contract."¹

The applicability of this language to that contained in the heading of the stock-book, signed by the defendant in this case, is palpable. That there are many cases where an agreement to take shares may be the completion of a contract to do so, goes without saying. But where, as in this case, the whole thing is *in fieri*, there is no completed contract — no meeting of minds — until the allotment is made and notice thereof is communicated to the subscriber, who under his hand and seal has offered or agreed to take shares, and to pay for them on their "allotment by the said company." It is singular, in a court which, carrying the rule to the other wrong extreme, held, as they did, in another case,² that setting out in a bill in equity writings between the parties to explain the meaning of uncertain, indefinite language in an arbitration agreement, could not be done; to find two of the judges, in order to override and control a solemnly sealed instrument, holding that mere preliminary parol matter entirely *dehors* the sealed instrument itself was to govern in the construction of the contract.

The fallacies in the following language, by Ritchie, C. J., are transparent. The learned judge very incorrectly says: —

"The contract in this case was this: The company applied to

¹ *Per* Lord Cairns in *Elkington's Case*,
L. R. 2 Ch. 535.

² In *Vernon v. Oliver*, '11 S. C. of
Can. R. at p. 163.

the respondent to take shares. The respondent agreed to do so, and bound himself under seal to pay a percentage on allotment. The assent of the respondent to the application of the company, *and the binding agreement signed and sealed by him, imposed on the company the binding duty of allotting the specified shares to him*, and constituted an agreement completed, binding on both parties, which either could enforce; entirely distinguishable from an agreement merely resting on an application for shares. The applicant was the company; and the sealed undertaking of the respondent was the acceptance of the company's offer, and fixed on the company the obligation to allot them, and when so allotted they became, *eo instanti*, vested in the respondent. In other words, the company sent an offer by which they were bound,¹ and under which, on receiving back the offer accepted, signed, and sealed by the respondent, a contract complete and binding on both sides was constituted."²

True, the learned chief justice says: "I think there was quite enough to satisfy the judge who tried this case, that the respondent knew that the company had acted on the agreement, had treated him as a shareholder, and had placed him on the register, and so had notice that the company had allotted to him the stock; and had the application come from the respondent to the company, that would have been sufficient to show that he knew that the company had assented to his request, and had completed the contract."³

If this had been correct, the case would have been even simpler than it is. But the learned judge, having entirely failed to show that this was correct, in effect abandons it, and says: "But apart from this, I think there was a completed contract, and no notice of allotment was necessary to constitute the defendant a subscriber to the stock, and a shareholder."⁴

From this it can be seen that in the view of the learned chief justice of that court, in order to make a sealed instrument, such as that in this case, itself govern the contract, it must depend upon the mere accident whether a subscriber had made the application to a canvasser for subscribers, to put his name on the stock list, or whether the canvasser had made the application to the subscriber. In the one case, according to this minority holding, there would be a perfectly good contract without any communication on the part of the other parties; while, in the other case, it would only be a contract when the subscriber had sufficient "to show

¹ It is this assumption, which has nothing whatever to rest upon, that is the base of the learned judge's fallacy in the matter.

² Pp. 431, 432.

³ Pp. 432, 433.

⁴ Page 435.

him that he knew that *the company had assented to his request* [manifested by his subscription to the stock list, apparently], *and had completed the contract.*"¹

All this is well answered by Henry, J., one of the majority judges in the court, covering the facts in the case. He says: "It is only, at the most, a unilateral contract, if one at all, and one which could not be enforced by the party subscribing. He could not, by his offer, oblige the provisional directors to allot any of the shares to him. A larger amount of stock than required might be subscribed for, and no one will doubt the power of the provisional directors to reject such applications as they pleased. So up to the time, at least, of the allotment, any subscriber could withdraw his offer to take the stock he subscribed for. The agreement in this case was to receive fifty shares when allotted; and, that, in my opinion, threw upon the provisional directors the *onus* of not only allotting the stock within a reasonable time, but of giving him notice that they have done so, also within a reasonable time."² And again,³ "The appellant claims that the respondent was a shareholder in the company from the time of the allotment of shares, but, if the signature of the respondent to the agreement was sufficient to bind him, then no allotment was necessary to be shown. If the agreement, however, is not sufficient alone, and the allotment was necessary, does it not legitimately follow that a notice of it became necessary? . . . Does not the acknowledged necessity for showing the allotment at the same time characterize the document signed as an incomplete contract? If so incomplete, does it not necessarily require, to complete it, that notice should have been proved within a reasonable time? . . . No one can be a subscriber to stock so as to make him a shareholder without the concurrence of the company through its officers. I must say I think the evidence of his ever having been a shareholder is wholly insufficient."

The two French-Canadian judges, Fournier, J., and Taschereau, J., of whom the latter confessed that he had "felt embarrassment in coming to a conclusion," and had "vacillated a good deal about it," concurred with Henry, J.

In the case the Judicial Committee of the Privy Council granted leave to appeal from the judgment we have been considering; but as the case was settled before coming on for argument, it was left in the state in which we have described it.

We, elsewhere, advert to the mistake that is made in improperly laying down as general rules, arbitrarily to be acted on, mere

¹ *Ibid.* 433.

² *Ibid.* 441.

³ At p. 443.

special matter, which in particular cases is of greater or less aid in getting at that which is the very essence of a contract, viz., the intention of the parties. While this (the intention of the parties) is the all-important matter in the construction of contracts, and is conspicuously so in every branch and department of the Contract of Sale, this fact is too often lost sight of; and, because, in a large number of cases, certain facts or incidents, such, for instance, as measuring, weighing, etc., or the absence of these acts, have great weight given them in the efforts of courts and judges to get at the intention of parties; in unexpected contingencies courts, judges, and jurists have lost sight of the fact that these are mere aids for getting at *the intention of the parties*; and, giving altogether greater weight to these facts or incidents than they legitimately are entitled to, they treat them as being themselves as of the very essence of the contract, and make them take the place of the essential ingredient in the contract, — the intention of the parties itself; instead of treating them as mere aids for ascertaining what such intention is. It therefore follows, that, when, based on such incorrect reasoning, and such altogether inaccurate conclusions, general rules are thus laid down for the construction of contracts, and for the deciding as to different incidents connected with them, such as the passage of property, the authority of agents, and the numerous other questions continually arising in the varied parts of the law of contracts, the introduction of new or slightly varied incidents, overcoming the mere arbitrary rules which had been too hastily and unwisely introduced, and the value of which had been entirely overestimated, shows their utter unsoundness. While being allowed just such weight as they are entitled to as aids to show what the intention is, when carried beyond this and made an equivalent for such intention itself, cases arise where the new or varied incidents connected with those rules deprive them of their force, and show their utter unsoundness. It is, in this way, that so many cases arise which are called “exceptions” to such too-hastily stated general rules; and, in many cases, they are such emphatic “exceptions,” as to show the radical unsoundness of such “rules,” and to entirely destroy them.

We are led to make these observations here in connection with the case we have just been considering. It is clear that when A. makes an offer to B. and it is accepted by B., and the acceptance is communicated to A. prior to the revocation of the offer, we have the meeting of minds necessary to make a contract. So, when A. makes an offer to B., which B. may accept, and yet direct evidence of the communication of that acceptance to A. may be want-

ing, it may be that the acts of A. may show his knowledge of such acceptance, and thus it be rendered clear that a complete contract has been made between them. But it does not from this follow by any means, as a matter of law or logic, in the absence of any such acts showing in A. a knowledge of such acceptance, that everything necessary has been done between the parties to constitute a perfect contract between them. Yet the reasoning of the minority judges in the unsatisfactory case of *Nasmith v. Manning*, in the Supreme Court of Canada, has no better foundation than this to rest upon.¹

¹ Another remarkable feature of this case from the Supreme Court of Canada, is, that Gwynne, J., who was (Ritchie, C. J. being one) the other dissenting judge in the case, previously delivered a judgment in the same case, in which he held just the reverse of his holding in the ultimate Canadian Court. His first judgment was delivered in the Ontario Court of Common Pleas, where he says: "Looking at the terms of the agreement by the defendant in the books of the company, which was signed and sealed by the defendant upon the 19th of June, 1859, the defendant agreed to become a holder of fifty shares in the capital stock of the company, and upon allotment to pay ten per cent of the amount of such shares; and looking upon the construction put by the company upon that agreement, treating it as an application for shares, as appears by their certificate of allotment, and having regard to the terms of the printed receipt [which says, "being amount of stock allotted by the within certificate," AUTH.], and upon the authority of Redpath's Case, L. R. 11 Eq. 86; Wall's Case, L. R. 15 Eq. 18; Pellatt's Case, L. R. 2 Ch. 527, and Gunn's Case, L. R. 3 Ch. 40, 45, there should be shown to have been some response, either in writing or verbally or by conduct, communicating to the defendant that the company had accepted his application and himself as a shareholder, for the fifty shares mentioned in his agreement, before he can be held liable as a shareholder." *Nasmith v. Manning*, 29 U. C. C. P. 52.

The case seemed sufficiently unsatisfactory before: this would seem to be all that was required to make it supremely so. But even this is not all. In the case in the Common Pleas, Hagarty, C. J., concurring with Gwynne, J., said: "I concur in thinking that our best course is to direct a new trial, so as to have it expressly found as a fact whether the defendant was notified, or received notice in any shape, or was made aware of the company having accepted him as a stockholder according to

his subscription; notice, in substance, that the directors or the company assented to or accepted him as the holder of the subscribed shares." Yet, in the case in Queen's Bench (*Nasmith v. Manning*, 5 Ont. App. 129 n.), we find this same Hagarty, C. J., after declaring that "The general principle was settled that, after proof of defendant's subscription, there should, in the language of Mr. Justice Gwynne, 29 C. P. 52, 'be shown to have been some response, either in writing or verbally, or by conduct, communicating to the defendant that the company had accepted his application and himself as a shareholder,'" actually holding that the defendant was liable, where the evidence and finding simply were, in effect, that there was an attempt to communicate the fact to the defendant, but no actual "communicating" of it to him. We do not find that Ritchie, C. J., or any of the other judges in the case delivered more than one judgment each. We consider the case entirely too clear for doubt that the judgments of the majority of the Ontario Court of Appeal and of the majority of the Supreme Court of Canada were right; and therefore, necessarily, that the judgments of the majority of the Ontario Court of Queen's Bench, and of the minority of the Supreme Court of Canada were wrong; the judgment of Gwynne, J., in the Common Pleas, being much sounder than his reverse judgment in the Supreme Court of Canada.

There is another point in this case (*Nasmith v. Manning*, 5 Ont. App. 136, 138) which requires notice. In the Court of Appeal, Burton, J. A., said: "The learned judge who presided at the last trial, whilst finding that the directors allotted to the defendant fifty shares of stock, has not found, and the evidence would not have warranted him in finding, that any letter or notice of allotment was sent to him. The fair inference, and in fact the only inference to be fairly drawn from the evidence is that no such notice was sent. . . . But it is of course imma-

In a case stated by us, *ante* p. 355, B., the local agent of an insurance company, being requested by the manager to take shares in order to induce other persons to become shareholders, offered to apply for 100 shares on condition that he should not be called upon to pay anything for the shares, but that all payment on the shares should be deducted out of his commission on shares sold by him, and upon being told by the manager of the company that he would "be allowed the privilege of paying them up as convenient," he sent in a formal application for 100 shares, which were duly allotted to him, and he was informed of the allotment, and was registered as the holder of the shares; but he never paid any money on application or allotment, or any calls. He signed a proxy paper under a protest that it should not cancel his agreement as to the non-payments on his shares, and attended two meetings of the company. His commission was insufficient to pay for the shares. Held, that he had entered into an absolute

terial how he received notice *if he did in fact receive it* within a reasonable time after the notice. The learned judge has nowhere found that he did receive notice." Then follows this extraordinary language: "Without expressing any opinion as to the general effect of the acceptance of an offer by letter duly posted, the principle established by *Dunlop v. Higgins*, 1 H. L. Cas. 381, has no application to the present case. In reviewing that decision in *Household Fire &c. Company v. Grant*, 41 L. T. N. S. 298, Bagallay, L. J., says, at p. 202: 'I think the principle established by that case is limited in its application to cases in which, by general usage, or of the relation between the parties to any particular transaction, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized.' If the learned judge had found as a fact that notice of allotment had been sent by post to the defendant, then I think we must have held, in deference to the authorities, that there was a completed contract between the parties." And this, after having just before quoted the language of Bagallay, L. J., showing, in effect, that that would not make a completed contract between the parties; there being nothing whatever in *Nasmith v. Manning* to show that "the acceptance of such offer by a letter through the post was expressly or impliedly authorized."

This is really worse than either of the awful congeries of blunders with which the case abounds on the other point which we have examined. The case of *Dunlop v. Higgins*, 1 H. L. Cas. 381, was a case where the whole contract was "by post,"

and not a question of allotment of shares, notified by post, where the application was not by post. So, in the other case cited by the Canadian judge (*Burton, J. A.*), *Baggally, L. J.*, whom he quotes, makes the same distinction, thus: "It has been established by a series of authorities, including *Dunlop v. Higgins*, 1 H. L. Cas. 381, in the House of Lords, and *Harris' Case*, L. R. 7 Ch. 587, in the Court of Appeal in Chancery, that, *if an offer is made by letter*, which expressly or impliedly authorizes the sending of an acceptance of such an offer by post, and a letter of acceptance properly addressed is posted in due time, a complete contract is made at the time when the letter of acceptance is posted, though there may be delay in its delivery." *The Household Fire, &c. Co. v. Grant*, 41 L. T. N. S. 301.

What was claimed in the case simply was, that, where a letter accepting an offer is dropped into the post-office by the acceptor *at the request of the offerer*, whether the request be express or implied, *then* the contract is complete, and the acceptor is not responsible for delay or negligence of the post-office officials. *Ib.* 299. This is very far from warranting the statement by *Burton, J. A.*, that the mere fact that notice of allotment is sent by post, no matter in what way the application for shares may have been made, completes the contract between the parties, without anything whatever to show that the posting of such letter has been "expressly or impliedly authorized." We examine this question further in a later volume of this work, in discussing the general question of Contract by Letters.

contract to take the shares with a collateral agreement as to the effect of taking them, which did not prevent him being made a contributory; and that, having allowed his name to be registered as a shareholder to induce other persons to take shares, he was precluded from denying himself to be a contributory.¹ In this case the application was made by the manager of the company to B. to take the shares, — a point influencing the mind of Ritchie, C. J., in *Nasmith v. Manning*,² but nothing was thought of that as rendering unnecessary an allotment, and a notice thereof to B. Notwithstanding the application was shown to have been so made, Malins, V. C., laid down the rule generally, — “In order to bind a person as a shareholder or contributory of a company, it is sufficient to show an application for shares, an allotment in consequence of such an application, and a communication of the fact of allotment to the applicant.”³

Two actions were brought by the plaintiffs⁴ for non-acceptance of shares, and for calls; and cross-actions were brought for recovery of deposits, and for damages for not duly allotting shares; turned into a special case. The defendant in one of the actions applied for shares on June 8, but no allotment was made till Nov. 23. On Nov. 8, he withdrew his application. The facts in the other action were the same, except that the defendant had never withdrawn his application. The Court of Exchequer held that the allotment must be made within a reasonable time; that the interval from June to November was not reasonable; and, therefore, that neither defendant was bound to accept the shares allotted, and they gave judgments for both the defendants.⁵

The case of *In re British and American Steam Navigation Company*, Ward's Case,⁶ was one, where, at the instance of the promoters of a limited company, and, as he was was told, *pro formâ*, W. signed an application for 200 shares, and at the same time executed a blank transfer. He paid nothing, never executed the articles of association, received no notice of allotment, and heard nothing about the company till he received notice from the liqui-

¹ Bridger's Case, L. R. 9 Eq. 74. See Pellatt's Case, L. R. 2 Ch. 527; Elkington's Case, L. R. 2 Ch. 511; Thomson's Case, 34 L. J. Ch. 525; Harrison's Case, L. R. 3 Ch. 633; Simpson's Case, L. R. 4 Ch. 184; Rogers's Case, L. R. 3 Ch. 633; Oriental Inland Steam Co. v. Briggs, 4 De G. F. & J. 191; Shackelford's Case, L. R. 1 Ch. 567, 570 n.; Langer's Case, 37 L. J. Ch. 292.

² 5 S. C. of Can. R. 417.

³ Bridger's Case, L. R. 9 Eq. at p. 78.

⁴ Ramsgate Victorial Hotel Co. v.

Montefiore; Same v. Goldsmid, L. R. 1 Ex. 109.

⁵ In this case it was claimed that shares might be completely allotted without any communication to the applicant, or acceptance by him, and *Ex parte* Bloxam, 33 L. J. Ch. 519, 574, and *Ex parte* Cookney, 3 De G. & J. 170, were relied on; but the court distinguished these cases, and referred to the judgment of Turner, L. J., in *Ex parte* Bloxam, 33 L. J. Ch. 575, 576, and dissented from the claim made as above.

⁶ L. R. 10 Eq. 659.

dator appointing a day to settle the list of past members. It was held by Stuart, V. C., that he was entitled to be taken off the lists, though it appeared that the shares had been, in fact, allotted to him; that deposits and calls had been paid on them by some persons without his knowledge; and, that by the transfer executed by him in blank, and subsequently filled up, the shares had been transferred to one of the promoters.

In dealing with the case, the remarks of the court are peculiarly applicable to the dissenting, and, we think, entirely erroneous judgment of Ritchie, C. J., in *Nasmith v. Manning*,¹ in the Supreme Court of Canada. It will be noticed that, in this case, as in that, the application for shares was made at the instance of the promoters of the company, as, in fact, in large numbers of such cases, applications are so made. As that is, notwithstanding the extraordinary stress laid upon it by Ritchie, C. J., an entirely immaterial matter, it is in this case altogether disregarded. But the necessity of a notice of allotment under such a state of facts is clearly shown. In dealing with this point in the case, Stuart, V. C., said: —

“The case against them is rested upon two grounds: *First*, that Messrs. Ward became by contract shareholders or partners in this company. In my opinion, that ground is unsustainable, and, indeed, it was not very much relied on by the counsel for the liquidator. In order to have a binding contract, there must be certainty as to the subject-matter, and the assent and full knowledge of both the contracting parties. What is said in this case to constitute the contract is an application for a certain number of shares, or for such other number as should be allotted. But this is no agreement to take any certain number of shares. When an application for shares is made, and that application is granted, and certain shares allotted, and the allotment is communicated to the applicant, a contract may be said to be entered into. But in this case nothing was communicated to the applicant as to the number of shares allotted, or whether any shares were allotted to him at all. There is not, therefore, here that sort of assent or acceptance, or that certainty as to the subject-matter, which is necessary to the validity of a contract.”²

¹ 5 S. C. of Can. R. 417.

² Wallis' Case, L. R. 4 Ch. 325; Crawley's Case, *Id.* 322; Robinson's Case, *Id.* 330; Gunn's Case, L. R. 3 Ch. 40, and the whole trend of the well-decided English cases, are to the same effect. Any cases which, apparently, hold a different doctrine, are either explained on their special circumstances, or are disapproved.

In Gunn's Case, L. R. 3 Ch. 40, Sir John Rolt fully discusses the cases, showing that both Bloxam's Case, 33 Beav. 529, and Cookney's Case, 3 De G. & J. 170, depended on special circumstances, and did not, as was contended, determine the simple question that all that was necessary to constitute a shareholder in a company was, that there should be an

Where a party signs the memorandum of association of a company he contracts to take the number of shares for which he subscribes. Thus S., in 1865, agreed to become a director of a company, and signed the memorandum of association for 200 shares. The articles of association empowered the directors to decline to commence business unless two-thirds of the capital were subscribed. S. attended the first meeting of the directors, and having unsuccessfully opposed a resolution to commence business before two-thirds of the capital had been subscribed, stated that he should resign his directorship; but, at the request of the directors, postponed his resignation till a further day, when it was accepted. The company carried on business and made some dividends, but was in February, 1870, ordered to be wound up. S. was not treated as a member of the company after his resignation, and no shares were allotted to him, and his name was never placed on the list of shareholders. Held, that he was not, by the lapse of time, and by the circumstances of the case, exonerated

application for shares to the company, and that the applicant's name should be placed by the company on the register in pursuance of that application; that mere application and entering on the register of shareholders must be held sufficient. Lord Justice Rolt, in refuting this contention, said: "I think that on principle, and without reference to the authorities, that proposition is not sound. I cannot agree that there is any fallacy in likening the contract between a company and a person who makes an application to become a member, to an ordinary contract,—the circumstances are different, but the principles are identical. There must be the consent of two parties to a contract. One man may make an offer to another, and say, 'I agree to buy your estate'; but the person to whom he has made the offer must say, 'I agree to sell you the estate,' or he must do something equivalent to an acceptance; something which satisfies the court, either by words or conduct, that the offer has been accepted to the knowledge of the person who made the offer. *I think that is requisite in the case of an application for shares, just as in the case of any other contract.*" It were strange indeed, if it were otherwise. And, further, after disposing of Bloxam's Case, 33 Beav. 529, and Cookney's Case, 3 De G. & J. 170, he says—"The case of Oakes v. Turquand, L. R. 2 H. L. 325, is of the same character. In that case there was an application for shares, and a letter in the ordinary form, in the fullest manner announcing the acceptance of the applicant's offer, and that he was a shareholder.

Everything was complete; and therefore to draw a conclusion from that case that a mere application for shares, followed by placing the name on the register, is sufficient, is, I think, out of the question." Then, in Pellatt's Case, L. R. 2 Ch. 527, Lord Cairns says, clearly: "I think that where an individual applies for shares in a company, there being no obligation to let him have any, *there must be a response by the company, otherwise there is no contract.*" Gunn's Case, L. R. 3 Ch. p. 43 *et seq.* And see Fletcher's Case (before Wood, V. C., Nov. 11, 1867, cited in Gunn's Case, L. R. 3 Ch. 43); Shackelford's Case, L. R. 1 Ch. 567; Mozley v. Tinkler, 1 C. M. & R. 692; Routledge v. Grant, 4 Bing. 653; Kennedy v. Lee, 3 Mer. 441. So, in Robinson's Case, 4 Ch. 332, Lord Justice Selwyn said: "It is clear, whether in the case of a trustee or any other person, that there must be that which the law requires in order to constitute a contract, and one of the things now determined to be essential to the constitution of a contract is that the letter of application should be followed by an allotment and communication of that allotment. The form of the communication is not material; but it has been decided in cases of which Gunn's Case, L. R. 3 Ch. 40, may be taken as an example, that *unless there is a communication of the allotment to the person who has made the application for the shares, there is no concluded contract, and he does not become a shareholder.* That rule applies to a person in the position of a trustee as much as to anybody else."

from liability to take the shares for which he had subscribed the memorandum of association.¹

The defendants, metal brokers, having previously sold ore of an American mine on a commission of two and a half per cent., arranged with a proprietor to assist in selling the mine to a company to be raised by him in England. He was to procure the appointment of the defendants as metal brokers of the company, at the usual rate of English commission, viz., one per cent., and he promised that the defendants should be liberally remunerated, to the extent, at least, of £5000 for their assistance, and to be compensated for the loss of the higher commission. They were, as he knew, acquainted with facts detrimental to the reputation of the mine, and he promised the liberal remuneration to ensure their silence respecting them. The defendants assisted him in his endeavors to sell the mine to a company to be formed for the purchase of it, but left him to fix the price, get up the company, and manage all details respecting the sale. He procured the formation of the plaintiff company, and the purchase by it of the mine for £100,000, half to be paid in cash, and half in paid-up shares. The defendants were appointed metal brokers of the company, at the one per cent commission, allowed themselves to be named in the prospectus as being ready to answer any inquiries relating to the mine, and answered such inquiries, but kept silence with respect to the detrimental facts known to them. Payment having been made for the mine to the proprietor, 250 fully paid-up shares out of those recovered from the company were transferred by him to the defendants, and were subsequently sold, and the proceeds received by them. This transaction was not disclosed to the com-

¹ *In re Robinson & Preston's Brewery Company, Sidney's Case*, L. R., 13 Eq. 228. The authorities are clear that a party, by signing the memorandum of association of a company, contracts to take the number of shares for which he subscribes. In *Hall's Case*, L. R. 5 Ch. 707, it was held, that where a man had signed a memorandum for 500 shares, he was liable for the whole 500 shares, though he had actually been allotted only 250 shares. It was held in *Evans' Case*, L. R. 2 Ch. 427, that a subscriber to the memorandum of association, being a director, having entered into a contract to take a certain number of shares, is bound to see, in his character of director, that that contract is carried into effect as regards himself and the shareholders. But in *Snell's Case*, L. R. 5 Ch. 22, there was power in the deed for the directors to accept the surrender of shares, and Snell, after subscribing the memorandum of association,

resigned his office of director, and surrendered his shares, which the directors accepted, and it was held that the surrender was good. See *Hutton v. Scarborough, &c. Co.*, 13 W. R. 631, 1059. See as to liability, notwithstanding lapse of time, *Levick's Case*, 40 L. J. Ch. 180; *Evans' Case*, L. R. 2 Ch. 427; *Tooth's Case*, before Giffard, L. J., cited in *Sidney's Case*, L. R. 13 Eq. 230.

When a party becomes a member of a company, induced to do so by misrepresentation of the promoters of the formation of the company, and, after becoming aware of the grounds of misrepresentation, acts as a shareholder and affirms his contract as owner of shares, he cannot thereafter, on the affairs of the company becoming disastrous, obtain a rescission of the contract on the ground of fraudulent misrepresentation. *Petrie v. Guelph Lumber Co.*, 11 S. C. of Can. R. 450.

pany. In an action to recover the proceeds as secret profits made by promoters, the judge left the question of promotorship without any definition to the jury, who found that the defendants were promoters, and gave a verdict for the plaintiff. Held, that there was ample evidence for the jury, and the learned judge was not bound to give them a definition of the term "promoter;" that it has no very definite meaning, but involves the idea of exertion for the purpose of floating a company, and also the idea of some duty towards the company imposed by, or arising from the position which the so-called promoter assumes towards it; and that the defendants were in a fiduciary relation to the company, and therefore liable to refund the secret profits, even although the contract of sale was not rescinded.¹

It was the duty of the secretary of a company to procure the execution of certificates of shares in the company with all requisite and prescribed formalities, and to issue them to the persons entitled to receive the same. By a resolution of the directors of the company, it was provided that certificates of shares should be signed by one director, the secretary, and the accountant. The secretary of the company, having executed a deed purporting to transfer certain shares in the company to one G., a purchaser of such shares, issued to G. a certificate stating that he had been registered as the owner of the shares. Such certificate was in the usual and authorized form, and sealed with the company's seal; but the signature of the director appended thereto was a forgery, and the seal of the company was, in fact, affixed thereto without the authority of the directors. G. deposited the certificate with the plaintiff as a security for advances; and subsequently executed a transfer of the shares to the plaintiff. Neither G. nor the plaintiff had any knowledge or reason to suspect that the certificate was otherwise than a genuine document, or that the matters stated therein were untrue. The company refused to register the plaintiff as owner of the shares, stating that there were no such shares standing in G.'s name in their books. On a special case to the Queen's Bench Division, it was held that the company were estopped by the certificate issued by their secretary from disputing the plaintiff's title to the shares.²

The ground of the decision is that the company was responsible for the fraud committed by its agent while acting within the or-

¹ The Emma Silver Mining Co. v. Lewis, 4 C. P. D. 396. See *Bagnall v. Carlton*, 6 Ch. Div. 371; *Emma Silver Mining Co. v. Grant*, 11 Ch. Div. 918; *Troyncross v. Grant*, 2 C. P. Div. 469; *In re Barry Ry. Co.*, 4 Ch. Div. 315; *Upton*

v. Greenlees, 25 L. J. C. P. 54; *Erlanger v. New Sombbrero Phosphate Co.*, 3 App. Cas. 1218, 1236.

² *Shaw v. Port Philip Gold Mining Co.*, 13 Q. B. Div. 103.

ordinary scope of his employment,¹ and that there was no difference as to such responsibility between a fraud carried out by means of forgery and any other fraud.

Plaintiff, the owner of railway shares in two companies, took certificates from the companies, for which he gave receipts. In so doing, he gave his address, in one instance, at the office of a banking company; in the other, at a club. He deposited the certificates with the manager of the bank for safe custody. The manager fraudulently sold the shares, and forged the name of the plaintiff to transfer deeds of the shares. The companies wrote to the plaintiff, informing him of the transfers; and receiving in one instance no answer, and in the other an answer purporting to come from the plaintiff, but, in reality, forged by the manager, registered the shares. On bill filed against one of the companies and the purchaser, praying that the purchaser might be decreed to deliver up the certificate to the plaintiff; that the company might be decreed to cancel the alleged transfer, and the entry of it in their books; to deliver to the plaintiff a stock certificate, and to pay the dividend then due, and all future dividends, — it was held that the plaintiff was entitled to the relief prayed, but without prejudice to any question at law or in equity between the co-defendants.²

M. agreed to take shares in a company incorporated by an Act of Parliament, providing that the company should not issue any share, nor should any share vest in the person accepting the same, unless and until a sum not less than one-fifth of the amount of such share had been paid in respect thereof. M. transferred his shares without paying one-fifth of the amount thereof; the transfer was duly registered, and M.'s name was removed from the register of shareholders. More than a year afterwards, the company commenced to be wound up. Held, that M.'s original agreement

¹ *In re Bahia & San Francisco Ry. Co.*, L. R. 3 Q. B. 584; *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; *Swift v. Winterbottom*, L. R. 8 Q. B. 244; *Swire v. Francis*, L. R. 3 App. Cas. 106.

² *Johnston v. Renton*, *Johnston v. Parsey*, L. R. 9 Eq. 181. *Cottam v. Eastern Counties Ry. Co.*, 1 J. & H. 243, was a case similar to these. There a forged instrument, together with the possession of title-deeds, was presented to the company; the company acted upon that; the person who claimed under the forged instrument was made a defendant; the company was also made a defendant; and the decree in the case was to restore the debentures to the plaintiff whose name

had been forged. In all of these cases, however, it was held that the negligence or mistaken confidence of the plaintiffs disentitled them to costs against either defendant. See further, on the main point involved, *Hildyard v. South Sea Co.*, 2 P. Wms. 76; *Ashby v. Blackwell*, Amb. 503; *Hare v. London & N. W. Ry. Co.*, Johns. 722; *Taylor v. Great Indian Ry. Co.*, 7 W. R. 182; *Sloan v. Bank of England*, 14 Sim. 475; *Davis v. Bank of England*, 2 Bing. 393; *Bank of Ireland v. Evans' Trusts*, 8 W. R. 401; 5 H. L. Cas. 389, 413; *Taylor v. Midland Ry. Co.*, 8 W. R. 401; *Carter v. Carter*, 3 Kay & J. 617; *Cottam v. Eastern Counties Ry. Co.*, 1 J. & H. 243.

to take shares was discharged by the transfer, which operated as a new contract between the company, M., and the transferee.¹

Where A. signed an application for shares in a company, upon condition that he should be appointed secretary, and his acceptance of the office was to be subject to further inquiries, which he had caused to be made respecting the position of the company; the shares were allotted the next day, but A., in consequence of information he received, declined the appointment, and required that the allotment should be cancelled; the court held, that his name must be removed from the register of shareholders.²

A shareholder in a limited company, A., which was being amalgamated with an unlimited company, B., received a printed form of application for shares in B. company, which he filled up with an application for ten shares, inserting in writing after the word "company," the words, "if limited." The answer he received in May, 1869, was that the directors of B. Company had considered his application, and had allotted him ten shares "in pursuance thereof," and had entered his name in the register. On June 1, 1869, he wrote: "Send me certificate for my ten shares in exchange for this allotment letter." The certificates were sent. Nothing more was done until Nov. 6, 1869, when the company was ordered to be wound up. In the form of application for shares, and in the allotment letter, the A. Company was always properly described as "limited," and the B. Company was properly described without that word. The applicant, upon being settled on the list of contributories, sought to be relieved, on the ground that what he had contracted for were shares in a limited company: held, that the absence of the word "limited" was sufficient notice to the applicant (especially to a shareholder in a limited company), that the company, for shares in which he was applying, was unlimited; and that the insertion by him of the words "if limited" into the form of application, was not effectual in imposing a condition upon the contract; and held, further, that he had lost any right to relief against the company which he might otherwise have had by delay and acquiescence.³

¹ *In re Towns' Drainage and Sewage Utilization Co.*, L. R. 16 Eq. 104. The agreement to take shares rested *in fieri*, and was capable of being discharged by a fresh agreement, as was decided in *Ex parte Beresford*, 2 Mac. & G. 197.

² *In re National Equitable Provident Society*, L. R. 15 Eq. 236.

³ *In re United Ports Insurance Co.*, Perrett's Case, L. R. 15 Eq. 250. Though under Lawrence's Case, L. R. 2 Ch. 412, 421; Kincaid's Case, *ib.* 420, 426; Peel's Case, *ib.* 674, 684; Heymann v. European

Central Ry. Co., L. R. 7 Eq. 154, and Taite's Case, L. R. 3 Eq. 795, it was evident that Perrett was concluded by his delay and acquiescence; the case mainly turned on the fact that the general law requires that a limited company shall not exist unless the word "limited" is annexed to the name of the company, and if that word is not so annexed the company is prohibited from having any lawful existence as a limited company. So, in the form of application for shares, and in the allotment letter, he had sufficient notice

C. applied for and was allotted shares in a banking company; paid the first instalment in the usual way, and received provisional certificates, which, on payment of the second instalment, and in executing the deed by a given day, were to be exchanged for shares; but in default of payment the rights and privileges appurtenant to the certificate were to be forfeited. He failed to pay the second instalment and to exchange his certificates. The company passed into liquidation. It was held, that he was under no obligation to take shares; that his interest was forfeited, and that he was, therefore, not liable to be placed on the list of contributories.¹

On May 9, the plaintiff, through his brokers, sold 200 shares in O. company to the defendants, who were stock-jobbers, the settling day being May 15. On the 10th the company stopped payment, and the petition for winding up was presented on May 11. The purchase-money was paid by the defendants on the 15th, and the certificates of the shares were then delivered by the plaintiff, and transfers were executed by him to seventeen persons as nominees of the defendants. The transfers could not be registered in consequence of the winding up of the company. It was held by Malins, V. C., upon bill for specific performance, that the defendants were bound to fulfil the contract; to repay the amount of calls paid by the plaintiff, and to indemnify him against future calls.² In so holding, Malins, V. C., expressed his satisfaction with knowing that the defendants could recover over against the seventeen principals to whom they had resold the shares. But on appeal, it was held, reversing the decree of Malins, V. C., that the contract between the plaintiff and the jobbers must be interpreted according to the rules of the Stock Exchange, and that after the jobbers had paid to the vendor his purchase-money, and given the names of the transferees to whom the vendor executed transfers, and after these transferees, through their brokers, had received the transfers and paid their purchase-money to the jobbers, the liability of the jobbers ceased.³

The plaintiff, a holder of 40 shares in a public company, sold that number on the Stock Exchange, through his broker, to a

that the company was not a limited company. Perrett's Case, L. R. 15 Eq. 254.

¹ *In re Asiatic Banking Corporation, Ec parte Colhun*, L. R. 9 Eq. 236. The rights acquired by the allottees are not absolute, but are rights which, according to the authorities, do not empower the directors to compel the holders of these provisional certificates to clothe themselves with the character of shareholders. *Eustace v. Dublin Trunk Ry. Co.*, L. R. 6 Eq. 182, and *Ormerod's Case*, L. R. 5 Eq. 110, are cases in point. And by non-payment

of the second instalment the certificates and the right to shares were forfeited, and after that the allottee could not claim to be a shareholder or be liable to be placed on the list of contributories. *Ec parte Beresford*, 2 Mac. & G. 197.

² *Coles v. Bristowe*, L. R. 6 Eq. 149.

³ *Coles v. Bristowe*, L. R. 4 Ch. 3. See *Shaw v. Fisher*, 5 De G. M. & G. 596; *Sheppard v. Murphy*, 16 W. R. 948; *Shepherd v. Gillespie*, L. R. 5 Eq. 293; L. R. 3 Ch. 764; *Evans v. Wood*, L. R. 5 Eq. 9.

jobber, for £202 10s. The defendant subsequently bought on the Stock Exchange, through a broker, 100 shares, and, in accordance with the usage, the name of the defendant was given to the plaintiff's broker as the purchaser of his 40 shares. The plaintiff executed and gave to his brokers a deed transferring the shares to the defendant, the consideration being left blank. The brokers filled up the consideration with £145, which, with the sums paid by the defendant for the other 60 shares, made up the price he had agreed to pay. This £145 was paid by the defendant, who thereupon received the transfer and certificates of the shares. The defendant never executed the transfer, but he kept it and the certificates in his possession and never repudiated the transaction. An order was made for winding up the company, and the plaintiff was compelled to pay two calls. It was held,¹ affirming the judgment of Lord Romilly, M. R., that there was a contract between the plaintiff and the defendant entitling the plaintiff to indemnity by the defendant.

This case followed *Coles v. Bristowe*;² the principle decided in both cases being that in each case the contract between the parties was so far completed that it could have been enforced by the respective purchaser. If facts arose in the case which would justify him in doing so, the contract should have been promptly repudiated, otherwise it would be held binding. But in another case,³ where the question was between the seller of shares and the jobber, the latter, under the state of facts there, was held liable to indemnify the estate of the seller for calls made upon him. In this case a firm of stock-jobbers agreed on the Stock Exchange to buy 100 shares for a certain day, and on the sale-note were the words "with registration guaranteed." The jobbers, before the day, gave the name of a transferee, who duly paid the purchase-money; the seller executed the deed of transfer, and delivered it to the transferee. The transferee never registered the transfer, and calls were made upon the seller, who filed a bill against the jobbers for indemnity, which was sustained. In this case there was a special contract by the jobber, which he had not performed, and for the breach of which he was liable. The other cases differed from this in that respect, and the question here was between the seller and jobber; not between the jobber and the buyer as in some of the other cases.⁴

¹ *Hawkins v. Maltby* (second case), L. R. 6 Eq. 505; affirmed, on appeal, L. R. 4 Ch. Ap. 200.

² L. R. 4 Ch. Ap. 3, reversing the judgment of Malins, V. C.; L. R. 6 Eq. 149.

³ *Cruse v. Paine*, L. R. 6 Eq. 641; affirmed on appeal, L. R. 4 Ch. Ap. 441.

⁴ Lord Hatherley said that *Coles v. Bristowe*, L. R. 4 Ch. 3, and *Paine v. Hutchinson*, L. R. 3 Ch. 383, had established that in the case of an ordinary sale

A person to whom shares in a company had been transferred while he was an infant, became adult nearly two years before the company commenced to be wound up, and during that time took no steps to repudiate the shares, though proceedings had been taken to enforce calls, was held to be a contributory.¹

It is a good plea to an action against a shareholder for calls, that the defendant was induced to become a shareholder by the fraud of the plaintiffs; that he had never recognized since notice of the fraud any rights or liabilities in himself, as such shareholder, nor received any benefit from his shares; and that, within a reasonable time after notice of the fraud, he had repudiated the shares and given notice to the plaintiffs of his repudiation.² The distinction is taken in this case, as in many others, between the liability of subscribers for stock as between themselves and the company, and as between themselves and creditors of the company. In the latter case, a liability has been held to attach in many instances where the reverse would be held as between subscribers and the company.

4. SALES OF STOCK IN INCORPORATED COMPANIES IN THE UNITED STATES.

It was held by the United States Supreme Court in *Fourth National Bank v. Francklyn*,³ where stockholders were made liable for the debts of the corporation, that the remedy given by the statute must be followed; and that where the remedies were confined to proceedings in equity, or to an action upon a judgment against the corporation, an independent action at law upon the original liability of the stockholder could not be maintained.

The individual liability of stockholders in a corporation for the

to a jobber the real contract was, that at the settling-day he would either take the shares himself or give the names of one or more transferees who would pay for the shares, and to whom no reasonable objection could be taken. In the case of *Cruse v. Paine* (*supra*), however, there was superadded an express provision that the sale was not made ordinarily and simply, but with registration guaranteed. These words introduced a material distinction, the effect being not merely that the jobber should find a purchaser who would pay for the shares and accept the transfer, but that the jobber should find a purchaser who would do that, and would also register the transfer; and until that had been done the jobber was not discharged from his engagement. *Cruse v. Paine*, L. R. 4 Ch. 443.

¹ *In re Norwegian Charcoal Iron Co.*, Mitchell's Case, L. R. 9 Eq. 363. See *Lumsden's Case*, L. R. 4 Ch. 31; *Dublin & Wicklow Ry. Co. v. Black*, 8 Ex. 181. In *Wilson's Case*, L. R. 8 Eq. 240, the infant did not attain his majority until after the winding-up had commenced, and he was held not liable as a contributory.

² *Bwlch-g-Plwm Lead Mining Co. v. Baynes*, L. R. 2 Ex. 324. The ruling of Willes, J., in *Glamorganshire Iron & Coal Co. v. Irvine*, 4 F. & F. 947, is in favor of such a plea. See, on the point, *Deposit Life Assoc. Co. v. Ayseough*, 6 E. & B. 761; *McCreight v. Stevens*, 1 H. & C. 454, showing the necessity of averring not only the fraud, but a repudiation of the shares, in defence to an action against a shareholder for calls.

³ 120 U. S. 747, 758.

payment of its debts is always a creature of statute. At common law it does not exist. The statute which creates such liability may also declare the purposes of its creation, and provide for the manner of its enforcement. The liability and the remedy being created by the same statute, the remedy provided is exclusive of all others. A general liability created by statute, without a remedy, may be enforced by an appropriate common-law action. But where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed.¹

In *Le Sassier v. Kennedy*,² the question involved was as to the remedy of the vendors of bank stock against the purchaser, because the latter had failed to insert his own name, or that of some other responsible person, in the blank which had been left by the sellers in the transfer they signed on the books of the bank, for the stock sold to the defendant. The bank having failed, the receiver had recovered against the plaintiffs for their individual liability under sec. 5151 of the Revised Statutes. The court held that the defendant's liability to them, if there was any, arose out of his contract with them as a purchaser, and not out of the banking law, thus presenting no federal question. There is nothing in the banking law which makes it the purchaser's duty to save his assignors from harm by reason of their former ownership, or which requires him to register his ownership for their protection.

In the absence of a statutory provision, unsecured floating debts for construction are not a lien on a railroad superior to the lien of a valid mortgage duly recorded, and of bonds secured thereby, and held by *bonâ fide* purchaser for value.³ The judgment in this case was, on application for a rehearing, affirmed.⁴ The court held that, whatever is the rule applicable to locomotives and cars, and loose property susceptible of separate ownership and separate liens, and to real estate not used for railroad purposes, as to their being unaffected by a prior mortgage given by a railroad company, covering after-acquired property, it is well settled, in the decisions of the court, that rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage, will be held, by the lien of such mortgage in favor of *bonâ fide* creditors, as against any contract between the

¹ See *Pollard v. Bailey*, 20 Wall. 520, 526; *Mills v. Scott*, 99 U. S. 25; *Terry v. Little*, 101 U. S. 216; *Patterson v. Lynde*, 106 U. S. 519; *Flash v. Conn.*, 109 U. S. 371; *Blair v. Gray*, 104 U. S. 769; *Chase v. Curtis*, 113 U. S. 452, 460; *Shellington v. Howland*, 53 N. Y. 371; *Ansonia Brass*

& Copper Co., 53 N. Y. 123; 91 U. S. 656; *Chamberlin v. Hugenot Manuf. Co.*, 118 Mass. 532.

² 123 U. S. 521.

³ *Porter v. Pittsburgh Bessemer Steel Co.*, 120 U. S. 649, 671.

⁴ *Ibid.*, 122 U. S. 267, 283.

furnisher of the property and the railroad company containing stipulations such as that the furnishers was to retain the possession of and title in them until payment was made in full.¹

A purchaser of all the stock in an incorporated association assigned portions of the stock as collateral security to meet his notes. He subsequently sold the mass of the property of the association, which consisted of real estate, to the plaintiff, getting the directors, as he met them, to execute a deed of the property, but which deed was executed without proper legal formalities or authority. The holders of the assigned stock transferred it to others, who had notice of the plaintiff's deed, and a subsequent deed was executed by the directors to those others. The court held that those others simply took the rights of their assignors, and that, although the plaintiff's deed was not legal, he was the equitable owner of the property, and was entitled to redeem it on payment of the amount of the notes to secure the payment of which the stock had been assigned.²

¹ *Dunham v. Railway Co.*, 1 Wall. 254; *Galveston Railroad v. Cowdrey*, 11 Wall. 459, 480, 482; *United States v. New Orleans R. R.*, 12 Wall. 362, 365; *Dillon v. Barnard*, 21 Wall. 430, 440; *Fosdick v. Schall*, 99 U. S. 235, 251. It is a well-settled principle that subsequent creditors cannot be heard to impeach an executed contract where their dealings with the company, of which they claim the benefit, occurred after the contract became an executed contract. *Graham v. Railroad Co.*, 102 U. S. 148.

² *Minneapolis Association v. Canfield*, 121 U. S. 295. This case was previously before the Supreme Court of Minnesota (*nom. Baldwin v. Canfield*, 26 Minn. 43), where the question as to the legality of the first deed, executed separately by the directors, was determined. By the articles of incorporation, the management of its affairs was vested in the board of directors. The court held, that the legal effect of this was to invest the directors with such government and management *as a board*, and not otherwise. This is in accordance with the general rule that the governing body of a corporation, as such, are agents of the corporation only as a board, and not individually. Hence it follows that they have no authority to act save when assembled at a board meeting. The separate action, individually, of the persons composing such governing body is not the action of the constituted body of men clothed with corporate powers. *In re Marseilles Extension Ry. Co.*, 7 Ch. Ap. 161; *D'Arcy v. Tamar, &c. Ry. Co.*, L. R. 2 Ex. 158; *Inhum v. Seymour*, 24 N. J. Eq. 143; *First Nat.*

Bank v. Christopher, 40 N. J. L. 435; *Junction Ry. Co. v. Reeve*, 15 Ind. 237; *Cannmeyer v. United German Churches*, 2 Sandf. Ch. 186; *Yellow Jacket Silver Mining Co. v. Stevenson*, 6 Nev. 51; *Stoynton, &c. Road Co. v. Craner*, 45 Pa. St. 386; *Edgerley v. Emerson*, 23 N. H. 555. But where an agent of a corporation has power to manage its affairs, authority to do all acts necessary to this purpose in the ordinary course of business is implied, and will be presumed to this extent till the contrary appears. *Broover v. Harbeck*, 1 Duer, 114; *Augusta Bank v. Hamblet*, 35 Me. 491; *Bank of Vergennes v. Warren*, 7 Hill, 91; *Conover v. Mutual Ins. Co.*, 3 Denio, 255; *Bates v. Keith Iron Co.*, 7 Met. 224; *Beers v. Phoenix Glass Co.*, 14 Barb. 358. In the *Bank of Middlebury v. Rutland & Washington R. R. Co.*, 30 Vt. 159, the court held (Redfield, C. J., delivering the judgment) that directors, in the absence of restrictions in the charter or by-laws, have all the authority of the corporation itself in the conduct of its ordinary business; adding, "And it is not important that this authority be conferred at an assembly of the directors, unless that is the usual mode of their doing such acts. If they adopt the practice of giving a separate assent to the execution of contracts by their agents, it is of the same force as if done at a regular meeting of the board. If this were not so it would lead to very great injustice; for it is notorious that the transaction of the ordinary business of railways, banks, and similar corporations in this country, is without any formal meetings or notes of the board. The cases

By sec. 5, 139 of the Revised Statutes, those persons only have the rights and liabilities of stockholders, who appear to be

are numerous where the consent of a majority of the directors, given separately, has been held binding upon the company. And if it were not so held, it would enable the majority of the business corporations of the country to escape from many contracts which require the action of the directors for their execution, whenever they choose to do so. This is, so far as I know, a universal rule in regard to the action of corporations within the scope of their charter powers. And in numerous well-considered cases in this country, where the *authorized agents of the company* [the italics are ours, ACTU.] have extended its business beyond the strict limits of those functions for which the charter was granted, the company has been held bound by the extension unless the corporators interfered to restrain such extension at the earliest moment. This rule was sanctioned by this court in *Noyes v. Rutland & Burlington Ry.*, 27 Vt. 110. There is now, I apprehend, no ground to question that a corporation is bound by the action of a majority of the board of directors, expressed in the usual mode which they adopt in the transaction of the business of the board."

For this position no authority is cited; *Noyes v. Rutland, &c. Ry.* (*supra*), in which, also, Redfield, C. J., delivers the judgment, being simply to the effect that a company is bound by the acts (within the scope of their authority, of course) of "the authorized agents of the company." A corporation usually acts by its authorized agents. Not infrequently the president acts as manager, and, therefore, as the agent of the company. In so far as he, or any other member of the board, is the agent of the company, the principle of the case cited applies to his acts. We think that Redfield, C. J., has confounded the acts of a director as agent of a company, and as member of the board by which the affairs of the company are governed. In the latter case the whole reasoning would seem to be with the Minnesota decision in *Baldwin v. Canfield*, 23 Minn. 43, and against the decision of the Vermont Court. As a member of the board a director has no independent entity. He acts simply as one of a board, as an arbitrator does on an arbitration (see *Peterson v. Ayre*, 15 C. B. 724; *Wade v. Dowling*, 4 El. & Bl. 44; *Hinton v. Mead*, 27 L. J. Ex. 140; *Stalworth v. Inns*, 13 M. & W. 466); or as, in England, a member of a vestry does in connection with vestry meetings. (See *Scaddling v. Lorant*, 3 H. L. Cas. 418; s. c. in Q. B., 13 Q. B. 706,

affirmed.) In *D'Arcy v. The Tamar, &c. Ry. Co.* L. R. 2 Ex. 153, the prescribed quorum of directors in the defendant's company being three, the secretary affixed the seal of the company to a bond, after having obtained the written authority of two directors at a private interview, and at another private interview the verbal promise of a third to sign the authority. The company being sued upon this bond, it was held that the seal of the company was affixed without lawful authority, and that the company was therefore not liable on the bond. Baron Martin says: "It is not necessary that there should be any fixed place of meeting, but it is quite clear that the directors are to act together, and in a meeting." And Bramwell, B.: "It is here shown affirmatively that the seal was not properly affixed; for this could not be done, except by the authority of such a number of directors as had power to act for the company, acting jointly and as a board. . . . It is an obvious consideration that, if it were otherwise, a quorum of directors might meet at one place with power to act for the company, and another quorum might, at the same time, meet at another place with equal power, and come to an opposite determination. But it is manifest that the seal was affixed without the authority of the directors meeting as a board, and the bond is therefore void." So, too, Channel, B.: "Without saying that the board are bound to meet at any particular place, yet when an authority is given to a less number to bind the whole body, they must meet in some place where all may be present, and may have the opportunity of expressing their assent or dissent." And Pigott, B.: "No doubt this is the deed of the company if it is the deed of the directors properly done. The question is, whether it is so done. The special act makes the quorum of a meeting of directors, three, and the general act speaks also of meetings of directors. Three directors have given their assent to the issuing of this bond; but were they a meeting? Clearly they were not; but, on the contrary, the secretary casually picked up three members of the board of directors, and obtained their assent separately. The seal has been fixed without the authority of a meeting of directors, and the bond is therefore invalid." The decision was under the English Companies Act, 1845, and a special act, but the *ratio decidendi* of the case is as applicable to incorporated companies here as in England. So, in *Stoynton, &c. Co. v. Craver*, 45 Pa. St. 386, it was well held,

such as are registered on the books of the association, the stock being transferable only in that way. No person becomes a stock-

where a contract had been made by the board of managers on one side and Craver on the other, that declarations of one or more of the managers (in effect, "directors"), not at a meeting of the board, that they would be willing to change the contract, did not bind the company, and was not evidence against the company. "The contract could be changed only by the parties, and the company could unite in the change only by its board acting in united counsel, and not by the several members of the board, answering to appeals of the other party. Such conversations and declarations ought not to be received in evidence. The act of the united board, and not of its disunited elements, is the matter to be proved." *Ibid.* The same principle applies not only to the cases of arbitrators and vestrymen, as we have pointed out, but to all cases where two or more parties have to act in a judicial character. Thus, in *Rex v. Hamstall-Ridware*, 3 T. R. 380, it was held, that where an authority was given by 43 Eliz. ch. 2, to bind children as apprentices "by the assent of two justices," an indenture of an apprentice assented to by the two justices *separately* was void, and no settlement was gained by serving under it. So, again, the general principle in relation to agencies is that where an authority is given to two or more persons to do a private act, the act is valid, to bind the principal, only when all of them concur in doing it. Andover v. Grafton, 7 N. H. 304; Jewett v. Alton, *Id.* 253. In *Despatch Line of Packets v. Bellamy Manuf. Co.*, 12 N. H. 205, 227, Parker, C. J., said: "We are of opinion, that where the by-laws of a private corporation confer upon the directors power to act in behalf of the corporation, without special limitation as to the manner, a majority may act, within the scope of the authority given to the board, and bind the corporation, either where there is a consultation of all together, and a concurrence of a majority; or where there is a regular meeting, at which all might be present, and a majority actually meet and act by a major vote. *Savings Bank v. Davis*, 8 Conn. 191. And when the act purports to be the act of the board, it may be presumed that it was the act of a majority, until the contrary is shown. We are not aware of any well-settled principle, or usage, which will carry us farther than this. The cases which hold that, a majority of a definite body being assembled, a major part of those assembled may act, presupposes a regular meeting, or one on notice." And again: "There are safeguards in consul-

tation; and considerations of policy, as well as of construction, which, in the absence of special authority authorizing a different course, furnish an argument in favor of the position, that an authority to two or more officers or agents of a corporation, in their discretion, to do certain acts, is not well executed by the assent of all, if given separately to the acts." *Despatch Line of Packets v. Bellamy Manuf. Co.*, 12 N. H. 224, *per* Parker, C. J.

Notwithstanding the holding of Redfield, C. J., in *Bank of Middlebury v. Rutland, &c. R. R. Co.*, 30 Vt. 159, 170, and his statement there, that "the cases are numerous where the consent of a majority of the directors, given separately, has been held binding upon the company," we think the holding in the Minnesota case, *Baldwin v. Canfield*, 26 Minn. 43, is the better law; and that the general rule that the separate action, individually, of the persons composing the governing body of the corporation, is not the action of the constituted body of men clothed with corporate powers, is the more rational one, and is supported by the great weight of authority. In California a resolution authorizing the sale of corporation property was adopted at a stockholders' meeting, at which the trustees of the company, and all the other stockholders, were present. The management of the company was vested in the trustees. Without any meeting as a board, they acted on the resolution of the stockholders' meeting. The court held that there was nothing in the nature of the offices, as connected with the object and business of the company, from which a general power in the trustees, when not acting as a board, to sell and convey the property of the company, could be implied. The court say: "The property in question was the property of the artificial being created by the statute. The whole title was in the corporation. The stockholders were not in their individual capacities owners of the property as tenants in common, joint-tenants, co-partners or otherwise. (*Gorham v. Gibson*, 28 Cal. 484; *Mickles v. Rochester City Bank*, 11 Paige, 128.) This proposition is so plain that no citation of authorities is needed. Had the stockholders all executed a deed of the property, they could have conveyed no title, for the reason that it was not in them (*Wheelock v. Moulton*, 15 Vt. 521); and what they could not do themselves they could not by resolution or otherwise authorize another to do for them. The corporation could only act — could only speak — through the medium prescribed by law,

holder, subject to such liabilities, and succeeding to such rights, except by such transfer. Until such transfer, the prior holder is

and that is its board of trustees. It is said, however, that the trustees were all present and participated in the proceedings at the stockholders' meeting, and assented to the resolution; that the resolution therefore was approved by all of the constituents of the corporation, and the powers of the corporation were exhaustively exercised. But they were acting in their individual characters as stockholders, and not as a board of trustees. In this character they were not authorized to perform a corporate act of the kind in question. The power to sell and convey could only be conferred by the trustees when assembled and acting as a board." *Gashwiler v. Willis*, 33 Cal. 11. See, further, *McCullough v. Moss*, 5 Denio, 575; *Conro v. Port Henry Iron Co.*, 12 Barb. 27, 63; *Rex v. Head*, 4 Burr. 2515, 2521; *Cannmeyer v. United German Lutheran Churches*, 2 Sandf. Ch. 208, 221, 223; *State v. Aucker*, 2 Rich. 245, 251, 253.

We have referred to the fact, in answer to the position taken by Redfield, C. J., in the *Bank of Middlebury v. Rutland & Washington R. R. Co.*, 30 Vt. 159, that where the act of a director is done in the capacity of an agent of the company rather than in that of a director, such case would come within the rule that the acts of the agents of the company, within the scope of their employment, bind the company. This rule would cover all such cases as those where a director acts as the manager of a company or in a clerical capacity. And there is another distinction which might be taken, namely, that while directors acting as such can only act in their *judicial* position as members of a board, yet where they have to perform any acts of a *ministerial* character these can be performed by them without meeting together as a board. Thus, we should say, where, at a meeting of the board, an order was made for the execution of a deed by the president attaching the seal, the act of attaching the seal could subsequently be done by the president ministerially, without the presence of the rest of the board. Or if property were vested in a board of trustees, and at a meeting of the board an order was made for the conveyance of such property, the act of executing the deed being then not judicial, the deed would be valid, though subsequently executed separately by the trustees. In the California case, *Gashwiler v. Willis*, 33 Cal. 11, 20, and in other cases cited in this note, the question of directors acting as agents is covered. Thus in the California case at p. 20 the court say: "The power to sell

and convey could only be conferred by the trustees when assembled and acting as a board. As a board they could perform valid corporate acts, and confer authority within the province of their powers upon the trustees individually, or upon any other parties, to perform acts as the agents of the corporation." The question has often been decided that where parties act in a *ministerial* and not in a *judicial* capacity their acts may be performed separately; but where they act judicially, *i. e.*, where it is necessary for them to exercise a judgment upon the subject, then they can only act when together. Thus it has been held in England from the very earliest times, on this principle, that the acts of magistrates, where the act is to be the result of their joint opinion, can only be performed by them at a meeting, — such as in making orders of removal (*Rex v. Wykes*, Andr. 233; 2 Str. 1092; *Rex v. Coln*, Burr. 136); orders of filiation (*Rex v. West*, 6 Mod. 180; *Billings v. Prinn*, 2 W. Bl. 1017), and appointment of overseers (*Rex v. Forest*, 3 T. R. 38). In this last-named case Lord Kenyon said: "It is admitted that in the case of orders of removal the magistrates must act together, and for this reason that they should assist each other, and that the result of their conference should be the ground of their determination. Now I cannot distinguish this case from that. This is not merely a *ministerial* act; if it were, like signing a rate, that might perhaps vary the question. But it is a *judicial* act, wherein the justices are to exercise a discretion. And in order to make this a good appointment the justices should have acted together." *Rex v. Forrest*, 3 T. R. 39; *Rex v. Great Marlow*, 2 East, 244, are in accord. So, in *Battye v. Gressley*, 8 East, 319, it was held that where judicial acts are to be done by two or more persons it is requisite that those acts should be agreed upon by such persons together; but after they have deliberated and agreed together upon the act to be done they may then separately sign the warrant or order to carry that act into execution. The same principle was acted on in *Rex v. Justice de Dorchester*, 1 Str. 393, with reference to justices signing a poor's rate, where it was held that the two justices are necessary to sign the rate only by way of form, for it is the church-wardens and overseers that have the power of making it, and the justices having insisted on their right to act judicially instead of ministerially, an attachment was ordered against them. We think these distinctions fully meet

the stockholder for all purposes of law. Hence, in *Richmond v. Irons*,¹ it was held that the delivery of certificates, and a power of attorney authorizing their transfer, to the president, not as president, but as vendee, did not relieve the vendor from his liability as stockholder on the insolvency of the bank; and that, in respect to such shares, sales made by him in February and June, 1873, left him still the statutory owner of the shares on the insolvency of the bank in September, 1873. His liability as such stockholder was the same as if he had sold and transferred the shares to the president on the day of the insolvency of the bank, when, as such a sale could only have been made by him in contemplation and actual knowledge of the suspension of the bank, it would operate as a fraud on the creditors; an effect which the law would not permit.

Where, with reference to the ownership of stock in a company, the issue is between the receiver representing the creditors, and the person standing on the register of the bank as a shareholder, the creditors generally are entitled to know who, as shareholders, have pledged their individual liability as security for its debts, engagements, and contracts. If a person permits his name to appear and remain in its outstanding certificates of stock, and on its register, as a shareholder, he is estopped, as between himself and the creditors of the bank, to deny that he is a shareholder; and his individual liability continues until there is a transfer of the stock on the book of the bank, even where he has in good faith previously sold it and delivered to the buyer the certificate of stock, with a power of attorney in such form as to enable the transfer to be made.²

In *Whitney v. Butler*,³ the court held that where the seller delivers the stock certificates and power of attorney to the buyer, relying upon the promise of the latter to have the necessary transfer made, or where the certificate and power of attorney were de-

the difficulties which led to the decision of the *Bank of Middlebury v. Rutland & Washington R. R. Co.*, 30 Vt. 159, — a decision which, obviously, notwithstanding the strong opinion of its correctness expressed by Redfield, C. J., we think cannot be sustained either on principle or authority.

But under the statute of 43 Elizabeth, ch. 2, requiring the assent of two justices to a parish indenture of apprenticeship, the assent of the two magistrates is sufficiently signified by one of them first signing it alone, and being afterwards present when the other signs it; for this, in effect, is as though both signed together, for they then meet and act judicially in agreeing to the propriety of the measure. *Rex v. Winwick*, 8 T. R. 454. See *Bank of Ire-*

land v. Evans' Charities, 5 H. L. Cas. 389, where deeds duly signed by trustees of an incorporated charity, but to which the corporate seal was fraudulently affixed by the secretary of the trustees, were held invalid.

¹ 121 U. S. 27, 58.

² *Davis v. Society of Essex*, 44 Conn. 582; *Adderly v. Storm*, 6 Hill, 624; *Auderson v. Philadelphia Warehouse Co.*, 111 U. S. 479, 483; *Johnston v. Latin*, 103 U. S. 800, 804; *Turnbull v. Payson*, 95 U. S. 418; *Brown v. Adams*, 5 Biss. 181; *Davis v. Stevens*, 17 Blatch. 259; *Irons v. Manuf. Nat. Bank*, 27 Fed. Rep. 591; *Bowdell v. Nat. Bank*, *Brown Nat. Bank Cas.* 146.

³ 118 U. S. 655.

livered to the bank without communicating to its officers the name of the buyer, the seller would be held liable as a shareholder until, at least, he should have done all that he reasonably could have done to effect a transfer on the stock register. But the court further held, where the defendants, through their agents, the brokers who sold the stock, and through whom they received the money paid for it, surrendered the certificates and power of attorney to the president of the company, he receiving them with knowledge, not only that the defendants had parted with all title to the stock and had been paid for it, but also that it had been purchased at auction by the vendee, the responsibility of the defendants must be held to have ceased upon the surrender of the certificates to the company, and the delivery to its president of a power of attorney sufficient to effect, and intended to effect, to that officer's knowledge, a transfer of the stock, on the books of the association, to the purchaser.¹

In *Black v. Zacharie*,² which was an attachment of shares in a corporation for an alleged debt, it was held, 1. That a provision in the charter of a corporation that transfers of its stock shall be made only on its books, is for the benefit of the corporation, and *bonâ fide* purchasers; attaching creditors cannot take advantage thereof. The provision applies only to transfers of the legal, not of the equitable title.³ 2. Though the positive or customary law of the place where the corporation is created governs the transfer of its shares, yet if there be no positive or customary law to the contrary, a transfer good by the law of the place of the owner's domicile is valid everywhere.⁴

¹ This case is distinguished from those in note 2 to p. 379 in that in those cases the certificates of stock and the powers of attorney were given to the purchaser of the stock instead of to the bank, as was done in *Whitney v. Butler*, 118 U. S. 655. In this case it is treated as analogous to that of a grantor of a deed depositing it in the proper office to be recorded. The general rule then is that the deed is considered as recorded from the time of such deposit. 2 Wash. R. P., B. 3, ch. 4, § 52.

² 3 How. 483.

³ The general construction which has been put upon the charters of banks containing similar provisions as to the transfer of their stock is that the provisions are designed solely for the safety and security of the bank itself, and of purchasers without notice; and that, as between vendor and vendee, a transfer not in conformity with such provisions is good to pass the equitable title, and divest the vendor of all interest in the stock. *Bank of Utica*

v. Smalley, 2 Cow. 778; *Gilbert v. Manchester Iron Co.*, 11 Wend. 628; *Commercial Bank of Buffalo v. Kortwright*, 22 Wend. 362; *Quiner v. The Marblehead Ins. Co.*, 10 Mass. 476; *Sergeant v. Franklin Ins. Co.*, 8 Pick. 90.

⁴ It is well settled as a doctrine of international jurisprudence that personal property has no locality, and that the law of the owner's domicile is to determine the validity of the transfer or alienation thereof, unless there is some positive or customary law of the country where it is found, to the contrary. This doctrine was recognized and affirmed by the Supreme Court of Louisiana in the case of *The United States v. The United States Bank*, 8 Rob. (La.) 262, as a part of its international jurisprudence. It was applied to support an assignment made in Pennsylvania by the Bank of the United States to certain assignees, who were intervenors of goods, debts, credits, and effects, in Louisiana. The court held that the assign-

The obligation of the contracts of a corporation is not impaired by its dissolution; such obligation survives, and the creditors may enforce their claims, in any mode permitted by the local laws, against any property belonging to the corporation which has not passed into the hands of *bonâ fide* purchasers, but which is held in trust for the company, or for the stockholders thereof.¹

By Rule 94, of the rules of practice for courts of equity of the United States,² right of action is given to stockholders of a corporation where the directors fail to take proceedings to enforce the rights of a corporation. But the stockholder so acting must show that he has made an honest and earnest effort to induce the corporation to take the necessary steps to obtain relief.³ In *Quincy v. Steel*,⁴ the plaintiff, without so bringing himself within this rule, filed a bill to enforce a claim of one corporation against another for a violation of a contract, but the court held that it was purely and simply a suit to recover money on a written contract in an action in the nature of assumpsit, and dismissed the bill.⁵

An agreement for the purchase by a syndicate of the controlling interest in a mine that one of their number was to "control the management of the mine," was held to be necessarily subject to such reasonable rules and regulations as should be adopted in a proper way, either by the stockholders or the directors, for the government of the conduct of the officers of the company.⁶

An actual manual subscription on the books of a railroad company is not indispensably necessary to bind a municipality as a

ment, being proved to be valid and effectual by the law of Pennsylvania, was to be deemed equally valid and effectual to pass the goods, credits, and effects of the bank to the assignees in Louisiana against the attaching creditors, who had notice of the assignment at the time of their attachment.

¹ *Mumma v. The Potomac Co.*, 8 Peters, 231.

² 104 U. S. ix., x.

³ *Howes v. Oakland*, 104 U. S. 450, 461; *Huntington v. Palmer*, *Id.* 482, 483; *Detroit v. Dean*, 106 U. S. 537.

⁴ 120 U. S. 241.

⁵ A single stockholder in a corporation has undoubtedly the same right to institute legal proceedings against the corporation for the protection of his individual rights that a third party not a stockholder possesses; but when he resorts to such proceedings to protect, not simply such interests, but the property and rights of the corporation against the action or threatened action of third parties, thus assuming duties properly devolving upon its directors, he must show a clear breach of duty on their part in neglecting or refusing to

act in the matter, amounting to such grossly culpable conduct as would lead to irremediable loss to him if he were not permitted to bring the matter before the courts. And such neglect and refusal must not be simulated, but real and persisted in, after earnest efforts to overcome it. *Detroit v. Dean*, 106 U. S. 537.

⁶ *Grant v. Parker*, 115 U. S. 51. The complainant was the president of the company, and the rules and regulations, which were held reasonable, prohibited the treasurer from paying the checks of the company unless they were signed by the president or vice-president, and countersigned by the secretary; directed that supplies required should be ordered through the head office; and authorized the vice-president to sign for the company in the absence of the president, and the superintendent at the mine to draw in the absence of the president on the company for debts incurred at the mine. It was held that there was nothing in this to interfere with the complainant's control as general manager. *Grant v. Parker*, *supra*.

subscriber to the capital stock. If the body or agency having authority to make such a subscription passes an ordinance or resolution to the effect that it does thereby, in the name and on behalf of the municipality, subscribe a specified amount of stock, and presents a copy of that ordinance or resolution to the company for acceptance as a subscription, and the company does in fact accept, and notifies the municipality, or its proper agent, to that effect, the contract of subscription is complete, and binds the parties according to its terms.¹

Though purchasers of negotiable securities are not chargeable with constructive notice of the pendency of a suit affecting the title or validity of the securities,² those who buy such securities from litigating parties, with actual notice of the suit, do so at their peril, and must abide the result, the same as the parties from whom they got their title.³

¹ Bates County v. Winters, 112 U. S. 325; Nugent v. The Supervisors, 19 Wall. 241; County of Moultrie v. Rockingham Savings Bank, 92 U. S. 631; County of Bates v. Winters, 97 U. S. 83, 90.

² County of Warren v. Marcy, 97 U. S. 96; White v. Vermont & Mass. R. R. Co., 21 How. 575; Moran v. Commissioners, 2 Black, 722; Mercer County v. Hackett, 1 Wall. 83; Gelpcke v. Dubuque, 1 Wall. 175; City of Lexington v. Butler, 14 Wall. 282; St. Joseph Township v. Rogers, 16 Wall. 644.

³ Scotland County v. Hill, 112 U. S. 183. The established rule is that a *lis pendens*, duly prosecuted, and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree; and the *lis pendens*, under the old chancery practice, began from the service of the subpoena after the bill was filed. The leading American case on this subject is Murray v. Ballou, 1 Johns. Ch. 566, where the question is exhaustively discussed. The same general principle that all persons who come in as purchasers, *pendente lite*, though they are no parties to the suit, they and their interests shall be bound and avoided by the decree, is very old English law. Baens v. Canning, 1 Ch. Cas. 301; Fleming v. Page, Rep. temp. Finch, 321; Culpepper v. Austin, 2 Ch. Cas. 115, 221; Preston v. Tubbin, 1 Vern. 286; Anon, *Ib.* 318; Goldson v. Gardner, cited in Self v. Madox, *Ib.* 459; Finch v. Newnham, 2 Vern. 216; Sorrell v. Carpenter, 2 P. Wms. 482; Bishop of Winchester v. Paine, 11 Ves. 200. Lord Hardwicke had frequent occasion to review the doctrine, and he always held that a purchaser, *pendente lite*, was bound by the decree in the suit. The pendency of the

suit was, of itself, notice; and he observed that the rule was to prevent a greater mischief that would arise by people purchasing under litigation. Garth v. Ward, 2 Atk. 174; Worsley v. Scarborough, 3 Atk. 392. In Walker v. Smalwood, Amb. 675, Lord Camden said: "I hold as a general rule, that an alienation pending a suit is void." And Sir Wm. Grant, in the Bishop of Winchester v. Paine, 11 Ves. 194: "He who purchases during the pendency of the suit is bound by the decree that may be made against the person from whom he derives title. The litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them, it is as if no such title existed. Otherwise, suits would be interminable, or, which would be the same in effect, it would be in the pleasure of one party at what period the suit should be determined. The rule may sometimes operate with hardship, but general convenience requires it."

The courts in this country have generally adopted the same rule as well to sales of personal, as to sales of real, property. See Murray v. Lylburn, 2 Johns. Ch. 441; Park v. Johnson, 11 Wend. 453; Kellogg v. Fancher, 23 Wis. 1; McCutcheon v. Miller, 31 Miss. 83; Scudder v. Van Amburgh, Edw. Ch. 30; Haddens v. Spaders, 20 Johns. 573; McRary v. Fries, 4 Jones (N. C.) Eq. 234; Fletcher v. Ferrell, 9 Dana (Ky.), 377; Leitch v. Wells, 48 Barb. 650. In the County of Warren v. Marcy, 97 U. S. 109, the court say: "Whilst the doctrine of constructive notice arising from *lis pendens*, though often severe in its application, is, on the whole, a wholesome and necessary one, affecting the authoritative administration of justice;

In a suit for the transfer of stock claimed to be wrongly standing in the name of another, not only that other person, but the

the exception (of sales of negotiable paper) to its application is demanded by other considerations equally important, as affecting the free operations of commerce, and that confidence in the instruments by which it is carried on, which is so necessary in a business community." On the same point see *Leitch v. Wells*, 48 N. Y. 586; *Stone v. Elliott*, 11 Ohio St. 252; *Kieffer v. Ehler*, 18 Pa. St. 388; *Durant v. Iowa County*, 1 Woolw. 69; *Winston v. Westfeldt*, 22 Ala. 760; *National Bank of Washington v. Texas*, 20 Wall. 72; *Olcott v. Supervisors*, 16 Wall. 678; *Mims v. West*, 38 Ga. 18. In *Diamond v. Lawrence County*, 37 Pa. St. 353, it was held that the purchaser of county bonds *pendente lite* is affected with constructive notice; but the decision is placed specially on the ground that, in Pennsylvania, such bonds are not deemed negotiable securities. In the case of *Murray v. Lylburn*, 2 Johns. Ch. 441, where the doctrine as to *lis pendens* was held to apply to *choses in action* (in that case, a bond and mortgage), assigned by one of the parties *pendente lite*, an important distinction was taken by the court as to the effect of the doctrine, in the sales of personal property, thus: "If W. had held a number of mortgages, and other securities, in trust, when the suit was commenced, it cannot be pretended that he might safely defeat the object of the suit, and elude the justice of the court, by selling these securities. If he possessed cash, as the proceeds of the trust estate, or negotiable paper not due, or perhaps movable personal property, such as horses, cattle, grain, &c., I am not prepared to say the rule is to be carried so far as to affect such sales. The safety of commercial dealing would require a limitation of the rule; but bonds and mortgages are not the subject of ordinary commerce."

It is, as will be seen from what we have stated in the foregoing, now well settled that the sale of negotiable paper is an exception to the rule, as it is an exception to most of the rules relating to sales. We can see no good ground, however, why the rule should not as well apply to personal property as to real estate. If A. and B. are in litigation with reference to either real or personal property, and, pending the suit, one of them should sell the subject of the suit, that should not affect the rights of the other party to the suit to have, as between themselves, and all parties deriving interest under them, the question of title disposed of, so far as the parties to the

suit and their assigns are concerned, by the suit so pending. If it were not so, as has often been stated, the litigation would be interminable. When we consider what *lis pendens* is, we at once must see how conclusive this is. Lord Cranworth, in *Bellamy v. Sabine*, 1 De G. & J. 566, 578, well says: "It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the courts often so describes its operation. It affects him not because it amounts to notice, but because it does not allow *litigant parties* to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. Where a litigation is pending between a plaintiff and a defendant as to the right of a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end. A mortgage or sale made before final decree to a person who had no notice of the pending proceedings would always render a new suit necessary, and so interminable litigation might be the consequence." This is quite as applicable to the sale of personalty, pending litigation, as it is to the sale of realty. Of course the principle only applies to a title derived from a party to the litigation, and not to title or claim of title *dehors* the litigants. The principle simply relates to matters that are *res judicata*, whether the subject be realty or personalty. See *Robinson's Case*, 5 Co. 32, where a plaintiff was defeated who claimed as administrator *pendente lite*, and yet was held, notwithstanding the judgment, to be able to maintain an action as executor.

The doctrine of *Culpepper v. Aston*, 2 Ch. Cas. 115, 121, and *Sorrell v. Carpenter*, 2 P. Wins. 482, is, that, pending a litigation, the defendant cannot by alienation affect the rights of the plaintiff to the property in dispute, and the same principle is applicable against a plaintiff, so as to prevent him from alienating to the prejudice of the defendant, where, from the nature of the suit, he may have in the result a right against the plaintiff; as, on a bill by a devisee to establish a will against an heir, if in the result the devise is declared void, the heir is not to be prejudiced by the alienation of the devisee

company also must be made parties to the suit. No relief whatever can be granted unless it is found to be the duty of the

(plaintiff) *pendente lite*. See *Garth v. Ward*, 2 Atk. 174; *Worsley v. The Earl of Scarborough*, 3 Atk. 392.

In these cases it is said that *lis pendens* is implied notice to all the world. Lord Cranworth, commenting on this, says: "I confess I think that is not a perfectly correct mode of stating the doctrine. What ought to be said is, that, *pendente lite*, neither party to the litigation can alienate the property in dispute so as to affect his opponent. The doctrine is not peculiar to courts of equity. In the old real actions the judgment bound the lands, notwithstanding any alienation by the defendant *pendente lite*." *Bellamy v. Sabine*, 1 De G. & J. 580. So, in the same case, Lord Justice Turner said: "The doctrine of *lis pendens* is not, as I conceive, founded upon any of the peculiar tenets of a court of equity as to implied or constructive notice. It is, as I think, a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this foundation, — that it would plainly be impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceeding. This doctrine belongs to courts of law no less than to courts of equity (2d Co. Inst. 375). No case, so far as I am aware, has yet occurred in which the doctrine has been applied so as to affect the title of the alienee of a defendant by virtue of a claim not interfering with the title of the plaintiff in the pending litigation. What is said in the cases of *Worsley v. Lord Scarborough*, 3 Atk. 392, and *Mead v. Lord Orrery*, 3 Atk. 243, and also in *Metcalf v. Pulvertoft*, 2 Ves. & B. 200, seems to me to tend the other way." *Bellamy v. Sabine*, 1 De G. & J. 584. All this is applicable, as expressed, to judgments in law and decrees in equity, and, in principle, equally to personalty as to realty. Precisely the same evils would result from a violation of the principle in the one case as in the other. Lord Romilly said, in *Berry v. Gibbons*, 28 L. T. N. S. 5, in deciding that *lis pendens* applies to personalty, "The whole doctrine of *lis pendens* would be cut away if, when a suit was registered, a person could say he did not know of it, or if the doctrine only applied to real estate. The old rule, that

when a bill was filed every one was bound to take notice of it, was a nuisance; but the provisions of 2 & 3 Vic. c. 11, § 7, with regard to a *lis pendens*, were reasonable, and any person lending money is bound to see that the property on which he lends it is not affected by any suit so registered." By the above statute in England, and by statute in many of the States in this country, registration of the suit is now necessary to cause the doctrine of *lis pendens* to apply.

The decision in *Berry v. Gibbons*, 28 L. T. N. S. 5, was, with reference to personalty, — a picture. On appeal, it was contended that the doctrine of *lis pendens* does not apply to chattels. The decision of Lord Romilly was reversed (*Berry v. Gibbons*, 29 L. T. N. S. 88; L. R. 8 Ch. 747); but not on the ground that the doctrine does not apply to personalty, but that the decree in the previous suit did not affect the title to the picture, the decree being merely that the defendant in that suit should administer, and did not take the sale of the personalty out of her hands. Numerous authorities were cited to show that Lord Romilly's decision as to the applicability of a *lis pendens* to personalty was wrong; but none of the cases cited, nor any other English cases, as far as we are aware, sustain such a view; nor did the court question the correctness on that point of Lord Romilly's statement of the law. We think the law is correctly stated by the Mississippi High Court of Errors and Appeals, in *McCutchen v. Miller*, 31 Miss. 65, 83, thus: "The general rule is that a purchaser, *pendente lite*, takes the property, subject to the rights of the complainant or plaintiff, as settled by the final decree or judgment of the court; for otherwise there could never be an end to litigation. The rule had its origin in controversies touching real estate; but it may be conceded that at this day it applies with equal force to controversies in regard to personal property; and it is only by analogy to the law that it is applicable to proceedings in courts of equity. Where the suit is brought to recover property, and the party is successful, the rule is one of almost universal application: the purchaser *pendente lite* takes, subject to the rights of the plaintiff, as settled by the judgment of the court. Nor can the purchaser in such case complain of the harshness of the rule, since the plaintiff, even if driven to an original action, could recover upon the strength of his title to the property, as settled by the judgment. The pur-

company to transfer the stock, and as to that controversy, the company is an indispensable party.¹

The stockholders of a Rhode Island corporation, unable to meet its liabilities, were individually liable for the debts of the corporation. C., one of the stockholders, transferred to the plaintiffs bonds of the company held by him, to meet debts due by him to the plaintiffs. On C. becoming insolvent, his assignee disputed the title of the plaintiffs to the bonds, on the ground that their transfer was a fraudulent preference. The dispute was settled between them, the plaintiffs agreeing to indemnify the assignee against any loss as a stockholder of the corporation. In an action by the plaintiffs to enforce the individual liability of the other stockholders, it was held that the plaintiffs did not by this contract agree to become stockholders of the corporation, nor to indemnify C. against his individual liability as a stockholder. The contract

chaser from the defendant, pending the suit, acquires only such title as the defendant can convey; and the judgment against the defendant is, by operation of law, a judgment, so far as it relates to the recovery of the property, *against all who acquire his title or possession of the thing pending the litigation*. This rule, whether it operates harshly in some cases or not, is nevertheless one of necessity, and as such must be applied in all cases *where a party is adjudged to be the rightful owner of property; and where another, pending the controversy, comes into possession of it under the defendant to the suit*."

We almost wonder how there ever could have been a doubt, as expressed by Chancellor Kent in *Murray v. Lylburn*, 2 Johns. Ch. 441, 444, or a contention, as made by counsel in *Berry v. Gibbons*, 29 L. T. N. S. 88; L. R. 8 Ch. 747, on the question. The doctrine of *lis pendens* is, in effect, nothing more than an application of the unquestioned doctrine of *res judicata*, which is palpably as applicable to adjudicated questions connected with personalty as with real estate. The doctrine of *res judicata* extends to all matters of fact litigated between the parties and adjudicated upon by a court of competent jurisdiction; the parties and all persons claiming in the same right are concluded or estopped by the results of the litigation, and cannot again dispute the same facts against the same parties, or those claiming under them. See *Boileau v. Rutlin*, 2 Ex. 665, 681; *Symons v. Rees*, 1 Ex. Div. 416. "When there is *res judicata* the original cause of action is gone, and can only be restored by getting rid of the *res judicata*." *Per* Lord Selborne, in *Lockyer v. Ferryman*, 2 App. Cas. 528. And *per* Lord Blackburn: "When a competent tribu-

nal, having had a case before them, have given a final judgment, it is *res judicata*." *Ibid.* *Lis pendens* is simply an application of this doctrine. The case of *Murray v. Lylburn*, 2 Johns. Ch. 441, was itself a case of a *chose in action*, to which it was held the rule applied. The same doctrine was held in *Diamond v. Lawrence County*, 37 Pa. St. 353; and there is, in principle, no more distinction between the application of *lis pendens* to other personalty than to *choses in action*; and, unquestionably, there is no more doubt as to the application of *lis pendens* to either than there is as to the application to either of the principle of *res judicata*; and, we think, the application of them both is beyond question. The simple principle is that, as a general rule, the seller of personalty can give no better title than he possesses, which is the basis of the doctrine of *lis pendens*, and is as applicable to personalty as to realty. See further, *Park v. Johnson*, 11 Wend. 453; *Kellogg v. Fancher*, 23 Wis. 1; *Scudder v. Van Amburgh*, Edw. Ch. 30; *Haddens v. Spaders*, 20 Johns. 573; *McKary v. Fries*, 4 Jones (N. C.), Eq. 234; *Fletcher v. Ferrell*, 9 Dana (Ky.), 377; *Leitch v. Wells*, 48 Barb. 650; *Griffith v. Griffith*, 1 Hoffman, 153; *Jackson v. Ketchum*, 8 Johns. 479; *Harris v. Carter's Adm'r*, 3 Stew. 233; *Orwiggs v. Myers*, 3 Bibb, 279; *Jackson v. Andrews*, 7 Wend. 152; *Lodge v. Simonton*, 2 Pa. 439; *Bolling v. Carter*, 9 Ala. 921; *Chandron v. Magee*, 8 Ala. 570; *Green v. White*, 7 Blackf. 242; *Walker v. Butz*, 1 Yeates, 574.

¹ *St. Louis & San Francisco Ry. Co. v. Wilson*, 114 U. S. 60; *Central Ry. Co. v. Mills*, 113 U. S. 249; *Thayer v. Life Assoc.*, 112 U. S. 717.

was made for the benefit of the assignee, by which he took an indemnity for himself and the bankrupt estate. And as the assignee was not liable as a stockholder,¹ the plaintiffs by their contract of indemnity assumed no liability, and held the bonds unfettered by any equities or conditions, and retained their right to enforce the individual liability of the stockholders for the payment of the bonds.²

Statutes requiring water companies, gas companies, and other companies of like character, to supply their customers at prices to be fixed by the municipal authorities of the locality, are within the scope of legislative power, unless prohibited by constitutional limitations or valid contract obligations. Whether expedient or not, is a question for the legislature, not the courts.³

Bonds were issued by a railway company in the Dominion of Canada. By an Act of Parliament there, it was enacted that new bonds were to be exchanged for the old ones; an arrangement to that effect having been previously assented to by a large majority of the stockholders of the company, and of the bondholders. The United States Supreme Court held: 1. That as there was no constitutional prohibition in Canada against the passing of laws impairing the obligation of contracts, and as the Parliament there had exclusive legislative authority over the corporation and the general subjects of bankruptcy and insolvency in that jurisdiction, that, therefore, the act was binding there. 2. That parties in this country who were holders of some of the original bonds, having bought them with notice, in legal effect, that they were entering into contract relations with a foreign corporation created for a public purpose, and carrying on its business within a foreign jurisdiction, took the bonds subject to the principle that whatever disabilities were placed upon the corporation at home, it retained abroad, and whatever legislative control it was subjected to at home must be recognized and submitted to by those who dealt

¹ South Staffordshire Ry. Co. v. Burnside, 5 Ex. 129; Furdoojee's Case, 3 Ch. Div. 268; *Ex parte Davis*, 3 Ch. Div. 463; *Streeter v. Sumner*, 31 N. H. 542; *Amory v. Lawrence*, 3 Cliff. 523; *Rugely v. Robinson*, 19 Ala. 404.

² *American File Co. v. Garrett*, 110 U. S. 288. As purchasers for value, they were entitled to all the rights of *bonâ fide* holders for value, among which was the right to enforce payment from the stockholders of the company. *Swift v. Tyson*, 16 Pet. 1; *Oates v. National Bank*, 100 U. S. 239; *Railroad Co. v. National Bank*, 102 U. S. 14.

³ *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 353. The question was settled by what was decided in

Munn v. Illinois, 94 U. S. 113, that it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, and that such regulations do not deprive a person of his property without due process of law. Where, by the constitution and the legislation under it, municipal authorities have been created a special tribunal to regulate such matters, their duties are judicial in their nature, and they are bound in morals and in law to exercise an honest judgment as to all such matters submitted for their official determination. *Spring Valley Water Works v. Schottler*, 110 U. S. 354.

with it elsewhere ; and that, therefore, the Canadian Act of Parliament relating to the bonds was binding on them. 3. That the Canadian Act of Parliament, in dealing with an embarrassed and insolvent railway company, and in providing for its reorganization in the interest of all concerned, was not passing an act which, if passed in this country, would have been in conflict with the Constitution of the United States, which, although prohibiting States from passing laws impairing the obligation of contracts, allows Congress "to establish uniform laws on the subject of bankruptcy throughout the United States ;" the Canadian act being in entire harmony with the spirit of bankrupt laws, the binding force of which, upon those who are subject to the jurisdiction, being recognized by all civilized nations.¹

Where an individual liability attaches to a shareholder in a company, that liability continues to attach itself to him until, without fraud as against the creditors of the company, for whose protection the liability is imposed, he relieves himself from it. That he can do by a *bonâ fide* transfer of the stock. But where the transferor, possessed of information showing that there is good ground to apprehend the failure of the bank, colludes and combines with an irresponsible transferee, with the design of substituting the latter in his place, and of thus leaving no one with any ability to respond for the individual liability imposed, in respect of the shares of stock transferred, the transaction will be decreed to be a fraud on the creditors, and he will be held to the same liability to the creditors as before the transfer. He will be still considered as a shareholder *quoad* the creditors, although he may be able to show that there was a full or a partial consideration for the transfer, as between himself and the transferee.²

¹ Canada Southern Railway Company v. Gebhard, 109 U. S. 527. See Cambrian Railways Company's Scheme, L. R. 3 Ch. 294, *per* Lord Cairns ; London Financial Association v. Wrexham, &c. R. R. Co., L. R. 18 Eq. 566 ; Bank of Augusta v. Earle, 13 Pet. 588 ; Railroad v. Koontz, 104 U. S. 12 ; Relf v. Rundel, 103 U. S. 226 ; Paul v. Virginia, 8 Wall. 168.

² Bowden v. Johnson, 107 U. S. 251. The question in this case arose under the Banking Act of 1864, c. 106, which declares that every person becoming a shareholder by transfer succeeds to all the liabilities of the prior holder. But it was held in National Bank v. Case, 99 U. S. 628, that a transfer on the books of the bank is not in all cases enough to extinguish liability. The court, in that case, declared, as one limit of the right to trans-

fer, that the transfer must be complete and entire, or one really transferring the ownership as between the parties to it. But there is nothing in the statute affirming, as another limit, that the transfer must not be to a person known to be irresponsible, and collusively made, with the intent of escaping liability and defeating the rights given by statute to creditors. In such case, the assignee may be liable as a shareholder, succeeding to the liabilities of the assignor ; but that is no reason why the assignor should not, at the election of creditors, still be treated as a shareholder ; he having, to escape liability, perpetrated a fraud on the statute. This is the view enforced by the Chief Justice in Davis v. Stevens, 17 Blatchf. 259 ; Bowden v. Johnson, 107 U. S. 251, 261.

A subscriber to the stock of a company is not liable at law to creditors of the company, for his unpaid subscription. The subscription is part of the assets of the company, so far as creditors are concerned. The stockholder is liable to the extent that the subscription represented by his stock requires him to contribute to the corporate funds, and when sued for the money he owes, it must be in a way to put what he pays, directly or indirectly, into the treasury of the corporation for distribution according to law. No one creditor can assume that he alone is entitled to what any stockholder owes, and sue at law so as to appropriate it exclusively to himself.¹

Coupons detached from bonds which have not matured, though the coupons are overdue, have not thereby lost the quality of negotiability by the law merchant;² and being made payable to bearer, they are payable to anybody, and the holder is not affected by the disability of the first receiver thereof to sue.³

Section 201 of the Revised Statutes of the United States prohibits banks making any loan or discount on the security of their own stock, but no penalty is imposed for contravening the provisions of the act. The plaintiff, having borrowed money from a bank on the security of its stock, brought an action after default by him and sale of the stock by the bank. The United States Supreme Court held, reversing the decision of the Circuit Court, that, as the bank and borrower were equally the subjects of legal censure they would be left by the courts where they had placed themselves; that, after the contract had been executed, and the security no longer subsisted in the hands of the bank, no one but the government could urge a prohibition against the legality of the transaction.⁴

In *Ottawa v. National Bank*,⁵ it was contended that an assignment or indorsement of the bonds by the payee named in them is, by the laws of Illinois, a prerequisite to pass the legal title in the bonds, and to authorize a suit by the holder in his own name, although they are also made payable to bearer. But the United States Supreme Court held that in Illinois as in New York,⁶ the

¹ *Patterson v. Lynde*, 106 U. S. 519; *Sawyer v. Hoag*, 17 Wall, 610; *Ladd v. Cartwright*, 7 Oreg. 329.

² *Thompson v. Perrine*, 106 U. S. 589; *Cromwell v. County of Sac*, 96 U. S. 51.

³ *Thompson v. Perrine*, *supra*; *Bank of Kentucky v. Wister*, 2 Pet. 318, 326; *Thomson v. Lee County*, 3 Wall. 327; *Bushnell v. Kennedy*, 9 Wall. 387; *City of Lexington v. Butler*, 14 Wall. 282; *Cooper v. Town of Thompson*, 13 Blatchf. 434; *Coe v. Cayuga Lake R. R. Co.*, 19 Blatchf. 522.

⁴ *National Bank of Xenia v. Stewart*,

107 U. S. 676. There is also another view on which the holding in the case can be sustained. The borrower authorized the bank, in a certain contingency, to sell his shares. This was not, in itself, unlawful. The shares being sold pursuant to the authority, the proceeds would be in the bank as the borrower's property, and the money loaned would be an offset to the proceeds. *Ibid.* p. 678.

⁵ 105 U. S. 342.

⁶ *Brush v. Admstrs. of Reeves*, 3 Johns. 439; *Dean v. Hall*, 17 Wend. 214.

holder of negotiable securities payable to a person named, or bearer, whether they are indorsed or not by such payee, acquires, by delivery merely, the legal title, and the consequent right to sue thereon in his own name.¹

Parties who have purchased stock, have accepted it, and received interest on it for years, are estopped from questioning the validity of the transaction, and of repudiating their character of stockholders in the company whose stock they thus hold.²

The following is a statutory provision of the State of Pennsylvania, regulating banks : —

“The stock of the bank shall be assignable and transferable on the books of the corporation only, and in the presence of the president or cashier, in such manner as the by-laws shall ordain ; but no stockholder indebted to the bank for a debt actually due and unpaid, shall be authorized to make a transfer or receive a dividend until such debt is discharged, or security to the satisfaction of the directors given for the same.”

In *National Bank v. Watsonstown Bank*,³ it was held that while this gave the bank a lien on the stock for the indebtedness of the stockholder, which would follow the stock in the hands of an assignee, yet the clause does not prevent the bank from waiving its right, nor prevent the cashier from acting for the directors by virtue of an express or implied authority. In that, as in other matters of ordinary business within the general scope of his official duty, he is their appropriate representative.⁴

¹ *Johnson v. County of Stark*, 24 Ill. 75 ; *Roberts v. Bolles*, 101 U. S. 119. The cases of *Garvin v. Wiswell*, 38 Ill. 215, and *Turner v. Peoria, &c. R. R. Co.* 95 Ill. 134, are distinguishable, because, in these cases, the instruments sued on were not negotiable, in the sense of the law merchant, so as to exclude defences or evidence of invalidity, even when held by a *bonâ fide* purchaser. See *Wall v. County of Monroe*, 103 U. S. 74. In *Johnson v. County of Stark*, 24 Ill. 75, Walker, J., said, in reference to municipal bonds and coupons issued to railroad companies : “It seems to be the well-settled doctrine that state, county, city, and other bonds and securities of this character are negotiable by delivery only, without indorsement, in the same manner as bank-bills, especially when they are payable to bearer.” In that case, the coupon was not payable either to order or to bearer, but the promise was to pay the amount named “on this coupon.” The court ruled that the holder of the coupon could sue and recover in his own name. See *New Hope Delaware Bridge Co. v. Percy*, 11 Ill. 467 ; *Supervisors of Mercer County v. Hubbard*, 45

Ill. 139 ; *Town of Eagle v. Kohn*, 84 Ill. 292.

² *Branch v. Jesup*, 106 U. S. 463.

³ 105 U. S. 217.

⁴ So, in *Case v. Bank*, 100 U. S. 446, it was held, that the cashier, who represented the bank in the act of transfer, was authorized to bind the bank, in consummating the transaction, by virtue of his office, in the absence of any by-law, according to the usage of the business and the practice of the particular bank, presumed to be known to and approved by the directors. See also, *Wild v. Bank*, 3 Mason, 505 ; *Lloyd v. Bank*, 15 Pa. 172 ; *Bank v. Warren*, 7 Hill, 91 ; *Bank v. Steward*, 37 Me. 519, 522. It may be fairly presumed, that the principal officer or clerk in attendance at the bank during the usual hours of business, is authorized to permit the transfer of shares when the case presented is one proper to be allowed. *Bank v. Kortright*, 22 Wend. 348, 350. A special assumpsit will lie, in the name of the party injured by the refusal, against a corporation for improperly refusing to make a transfer of shares of capital stock. *Kortright v. Bank*, 20 Wend. 91.

Under the above statute, A. borrowed money of B., to whom he assigned and delivered his certificate of stock as collateral security, with authority to sell in case of default in payment. On A.'s default, B. sent the certificate to the cashier of the bank, who made the requisite entries on the stock ledger which he kept, it being the only book except the book of certificates showing the transfer of stock, and it was his practice to keep the account of such transfers without consulting the directors in each case. The latter had adopted no by-law on the subject. On B.'s instructing the cashier to sell the stock, the latter informed him that it would not be necessary to send him a certificate, but to forward a power of attorney, which B. did. Part of the stock was sold; the proceeds were remitted, and the proper entries were made on the stock ledger. A. subsequently became insolvent. He was indebted to the bank, and, on the directors refusing to approve the transfer, B. brought suit to compel the issue to him of the customary certificate of stock. It was held, 1. That, as between A. and B., the title to the stock passed by A.'s delivery of the certificate with the accompanying power of attorney. 2. That the acts of the cashier were binding on the bank, and the transfer by him, made on the stock ledger, vested in B. a complete and unincumbered title to the stock, and a right to the usual certificate as evidence of his ownership. 3. That had B. acquired merely an equity, based on his contract, the legal right of the bank to assert its lien was lost by its own laches, and the enforcement of it would, under the circumstances, operate as a fraud.¹

In *Scovill v. Thayer*,² the following principles were laid down:—

First. As a general rule, corporations can have and exercise only such powers as are expressly conferred on them by the act of incorporation, and such implied powers as are necessary to enable them to perform their prescribed duties.³

Second. A corporation has no implied power to change the amount of its capital as prescribed in its charter, and all attempts to do so are void.⁴ The attempt to increase the stock of the company beyond the limit fixed by its charter being *ultra vires*, the

¹ *National Bank v. Watertown Bank*, 105 U. S. 217. The court held that the clause which denies to the stockholder the privilege of making a transfer of his stock, while a debtor, until his debt is discharged or secured to the satisfaction of the directors, does not forbid the bank to waive its rights, or prevent the cashier from acting for the directors, by virtue of an express or implied authority. In this, as in other matters of ordinary business, within the general scope of his official

duty, he is their appropriate representative. *Ibid.* at p. 221.

² 105 U. S. 143.

³ *Fertilizing Company v. Hyde Park*, 97 U. S. 659; *Salomons v. Laing*, 12 Beav. 339; *Eastern Counties Railway v. Hawkes*, 5 H. L. Cas. 331.

⁴ *Mechanics' Bank v. New York & N. H. R. R. Co.*, 13 N. Y. 599; *New York & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Railway Company v. Allerton*, 18 Wall. 233; *Stace & Worth's Case*, L. R. 4 Ch. Ap. 682, n.

increased stock itself is therefore void. It confers on the holders no rights, and subjects them to no liabilities. The contract to pay for spurious shares is without consideration, and cannot be enforced.

Third. Where a corporation is absolutely without power to increase its stock above a certain limit, the acquiescence of the shareholder can neither give it validity, nor bind him or the corporation.¹ Therefore, where one has attended by proxy the meetings at which the increase of the stock beyond the limit imposed by law was voted for, and having received certificates for the stock thus voted for, and after such increase the company, by its agents, has held itself out as possessing a capital of \$400,000, and invited and obtained credit on the faith of such representations, he is not estopped from setting up the nullity of the unauthorized stock; the case differing from that where the corporation has the power to issue stock, and where the stockholders have been held estopped from setting up informalities in such issue.²

Fourth. As it is a general rule that a holder of claims against an insolvent corporation cannot set them off against his liability for an assessment on his stock in the corporation, in a suit by an assignee in bankruptcy,³ therefore one who has paid calls on unauthorized stock cannot set off such payments against calls on his authorized stock.

Fifth. An agreement between a company and its stockholders that the latter shall not be called upon to pay any further assessments on their stock, is valid as between themselves, and in England it has been held in recent cases that not only is the company, but its creditors also are bound by such a contract.⁴ But in this country, it is held that such a contract, though binding on the company, is a fraud in law on its creditors, which they can set aside,—that when their rights intervene, and their claims are to be satisfied, the stockholders can be required to pay their stock in full;⁵ the reason being that the stock subscribed is considered in equity a trust fund for the payment of creditors.⁶

Sixth. When stock is subscribed to be paid upon call of the company, and the company neglects or refuses to make the call, as a court of equity will do what it is the duty of the company to

¹ Lathrop v. Kneeland, 46 Barb. 432; Mackley's Case, 1 Ch. D. 247; Zabriskie v. Cleveland, &c. R. R. Co. 23 How. 381.

² Upton v. Tribilecock, 91 U. S. 45; Chubb v. Upton, 95 U. S. 665; Pullman v. Upton, 96 U. S. 328.

³ Sawyer v. Hoag, 17 Wall. 610; Sanger v. Upton, 91 U. S. 56; Scammon v. Kimball, 92 U. S. 362; County of Morgan v. Allen, 103 U. S. 498.

⁴ Waterhouse v. Jamieson, L. R. 2

H. L. (Sc.) 29; Currie's Case, 3 De G. J. & S. 367; Carling, Hespeler, and Walsh's Cases, 1 Ch. D. 115.

⁵ Sawyer v. Hoag, 17 Wall. 610; New Albany v. Burke, 11 Wall. 96; Burke v. Smith, 16 Wall. 390.

⁶ Wood v. Dummer, 3 Mass. 308; Mumma v. Potomac Co., 8 Pct. 231; Ogilvie v. Knox Insurance Co., 22 How. 387; Sawyer v. Hoag, *supra*.

do, the court may itself make the call, if the interests of the creditors require it.¹ But, under such circumstances, before there is any obligation upon the stockholder to pay without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or, at the very least, some authorized demand upon him for payment. And the statute of limitations does not begin to run in his favor until such order or demand.²

The defendant was the owner of eighty-five shares of fully paid-up stock in the National Bank of Missouri. On May 16, 1877, he sold his stock to a broker, to whom he delivered his stock certificate, indorsed with a blank power of attorney, authorizing the attorney, whose name might be subsequently inserted by the broker, or any other party becoming the owner of the certificate, to transfer it on the books of the bank according to its regulations. He was paid by the broker, who withheld from the defendant the name of the purchaser. The broker was representing the president of the bank, one of the bookkeepers of which filled up the power of attorney with his own name, by direction of the broker, and transferred the stock on the stock register of the bank in the president's name, as trustee. By the regulations of the bank, stock was only transferable in person or by attorney. The president gave his own check to the broker for the stock, and the check, on presentation, was paid out of the president's own funds. The president was in the habit of dealing in the stock, and, on May 29, he voted on the stock bought from the defendant. The stock in the other bank books was entered as bought for the bank, and, by the president's directions, he was credited with the purchase-money, which was charged to the bank. Neither the defendant nor the broker had any knowledge of this, but the bookkeeper, whose name was filled in the power of attorney, had such knowledge. The purchase on the part of the bank was illegal. The bank having failed on June 20, the receiver brought an action to set aside the purchase of the stock, and to have the defendant declared a stockholder, and ordered to repay the money which he had received, on the ground that the knowledge of the attorney who transferred the stock was the knowledge of his principal, the defendant. The court held³ that the validity of the sale and its completeness had to be determined by the relation which the contracting parties at the time openly bore to each other; that, there

¹ *Carry v. Woodward*, 53 Ala. 371; *Robinson v. Bank of Darien*, 18 Ga. 65; *Ward v. Griswoldville Manuf. Co.*, 16 Conn. 593.

² *Van Hook v. Whitlock*, 3 Paige, 409; *Salisbury v. Black's Admstr.*, 6 Har. & J.

293; *Sinkler v. Turnpike Co.*, 3 Pa. 149; *Walter v. Walter*, 1 Whart. 292; *Quigg v. Kittridge*, 18 N. H. 137; *Niummo v. Walker*, 14 La. An. 581.

³ *Johnston v. Laffin*, 103 U. S. 800.

being no imputation of fraud, the validity of the sale could not be made to depend upon the accident of the immediate purchaser, or of the party to whom he might transfer the certificate, employing, to make the formal transfer, one who was acquainted with the secret interests of others in the shares. Of course the result would have been otherwise if the sale had been made by the defendant merely to evade his just responsibility as a stockholder, or to work a fraud upon other stockholders or creditors of the bank.¹

The agent of an insurance company applied to the defendant to subscribe for stock. He assented, and executed a bond, acknowledging the receipt of ten shares of the stock, in consideration of which he bound himself to pay the price of the stock in instalments, twenty-five per cent "upon receipt of stock certificate," and the balance at later dates. At the time of executing the bond, he paid twenty-five dollars on account of the stock. The defendant's name was entered on the books as a stockholder, *and published in their publications as one of the stockholders*; the defendant having no knowledge of the publication. Soon after, in consequence of losses by fire, the company became bankrupt, the defendant having paid nothing further, and no stock certificate having been delivered to him. In an action by the assignee in bankruptcy, the judges of the Circuit Court were equally divided as to whether the delivery of a stock-certificate was necessary to make the defendant liable. The United States Supreme Court held² that his receipt for the stock was an acknowledgment, so far as he was concerned, that he had become a stockholder, and, after an acceptance by the company, his liability was fixed whether any publication was made or not. The publication was only important as a means of showing that his subscription made to an agent had been accepted and ratified by the company. The entries on the book

¹ The transfer of shares in the national banks is not governed by different rules from those which are ordinarily applied to the transfer of shares in other corporate bodies. *Johnston v. Laffin*, 103 U. S. 804. The entry of the transaction on the books of the bank where stock is sold, is required, not for the translation of the title, but for the protection of the parties and others dealing with the bank, and to enable it to know who are its stockholders, entitled to vote at their meetings and receive dividends when declared. It is necessary to protect the seller against subsequent liability as a stockholder, and perhaps also to protect the purchaser against proceedings of the seller's creditors. Purchasers and creditors, in the

absence of other knowledge, are only bound to look to the books of registry of the bank. But, as between the parties to a sale, it is enough that the certificate is delivered with authority to the purchaser, or any one he may name, to transfer it on the books, and the price is paid. If a subsequent transfer of the certificate be refused by the bank, it can be compelled at the instance of either of the parties. *Bank v. Lanier*, 11 Wall. 369; *Webster v. Upton*, 91 U. S. 65; *Bank of Utica v. Smalley*, 2 Cow. 770; *Gilbert v. Manchester Iron Co.*, 11 Wend. 627; *Commercial Bank of Buffalo v. Kortright*, 22 Wend. 348; *Sargeant v. Franklin Ins. Co.*, 8 Pick. 90.

² *Hawley v. Upton*, 102 U. S. 314.

had the same effect. And although the company could not have recovered against him without a tender of the certificate, the assignee, as representing the creditors, had a right to recover from him on his general liability to pay for his stock, which, by his subscription, he agreed he would pay.¹

Under the Bank Act of 1864,² the stockholders are liable to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares, but they are responsible *equally and ratably, and not for one another*. Hence, solvent stockholders are not liable for deficiencies caused by the insolvency of other stockholders.³ This rule has been applied under statutes not containing such words as we have italicized.⁴

¹ In delivering judgment the court say: "It cannot be doubted that one who has become bound as a subscriber to the capital stock of a corporation must pay his subscription if required to meet the obligations of the corporation. A certificate in his favor is not necessary to make him a subscriber. All that need be done, so far as creditors are concerned, is that the subscriber shall have bound himself to become a contributor to the fund which the capital stock of the corporation represents. If such an obligation exists, the courts can enforce the contribution when required. After having bound himself to contribute, he cannot be discharged from the obligation he has assumed until the contribution has actually been made, or the obligation in some lawful way extinguished." *Upton v. Trebilcock*, 91 U. S. 45; *Webster v. Upton*, 91 U. S. 65. This is a very different case from those we have considered previously in this Part (see *ante*, p. 352 *et seq.*), where a party was simply an applicant for shares. In this case there is the express acknowledgment of the receipt of a definite number of shares; a payment is made on account of them, and a written agreement to pay the balance for the specified number of shares is signed by the party, and delivered by him to the agent of the company. The court, on these facts, say: "The paper he signed was delivered to the company by the agent who got it. That it was accepted by the company as a *subscription* [not as an *application*, mark. AUTH.] is shown conclusively by the fact that his name was entered on the books as a stockholder, and publication made accordingly. It matters not that he had no knowledge of such a publication. *His receipt for the stock was an acknowledgment*, as far as he was concerned, *that he had become a stockholder*, and after an acceptance by the

company his liability was fixed, whether any publication was made or not. The publication is only important as a means of showing that his subscription made to an agent had been accepted and ratified by the company. The entries on the books had the same effect. The publication only made it more notorious. The ultimate fact to be established is, that a *subscription* had not only been made by Hawley, but *accepted* by the company." *Hawley v. Upton*, 102 U. S. 314. The difference between this class of cases, where the party subscribes for shares, and binds himself definitely by his subscription for the specified number, and that where a mere application is made for shares, as in the other class of cases, is as marked in its legal effect as is the case where A. writes B., "Will you sell me from 500 to 1000 barrels of XX flour at \$5 per barrel, deliverable on board of ship at your port?" in which there is no contract on the part even of B. (much less of A.) until he communicates a definite reply to A.; from the case where A. writes B., "Ship me 1000 barrels of XX flour, at \$5 per barrel, f. o. b., at your port, and draw on me at sight," in which A. is bound, without any communication, on the ordered flour being so shipped. It was in the failure to notice this distinction which led to such strange confusion in the Canadian courts in dealing with the case of *Nasmith v. Manning*, 5 S. C. of Can. R. 417, which we have examined, *supra*, p. 357 *et seq.*

² Rev. Stats. §§ 5, 151.

³ *United States v. Knox*, 102 U. S. 422; *Crease v. Babcock*, 10 Met. 525.

⁴ *Crease v. Babcock*, *supra*; *Attwood v. R. I. Ag. Bank*, 1 R. I. 276; *In re Hollister Bank*, 27 N. Y. 393; *Adkins v. Thornton*, 19 Ga. 325; *Robinson v. Lane*, *Ib.* 337; *Wiswell v. Starr*, 48 Me. 401.

Stock in a bank was pledged to the plaintiffs to secure the payment of a note, with power to sell the stock in event of the note not being paid. The note not having been paid, the plaintiffs sold the stock, which the cashier of the bank refused to transfer on the ground that the bank had a lien on the stock for the indebtedness of the pledgor. The bank having failed, the court held that, the bank not having the lien which they claimed, the act of the cashier was the act of the bank, and that the plaintiffs had a right to recover against the receivers of the bank.¹

By statute in Georgia, an unlimited liability was imposed on stockholders in banks for the redemption of all bills and notes in proportion to the amount held. In *Mills v. Scott*,² it was held that though ordinarily the proceedings to enforce this liability against individuals was in equity, yet as the actual amount of the outstanding bills and notes was known, as well as the proportion of the defendant's stock, which was one-twentieth of the whole stock, debt at law would lie against him, as his indebtedness was thus fixed, and recovery could be had against him at law for one-twentieth of the amount of the bills and notes.

Suits may be maintained upon unpaid coupons in advance of the maturity of the principal debt, and without producing the bonds, and the holder of such coupons is entitled to recover interest thereon from their maturity.³ And, under usual statutes of limitations, such as that of Iowa, the right of action runs as to the coupons from their maturity, which is the period at which the right of action on them accrues; and this rule is not affected by the fact that the coupons have not been separated from the bonds.⁴

An agreement by one association to pay the bonds of another does not give the holder of such bonds the right to maintain an action in his own name, for the amount of the bonds, there being no privity of contract between the bondholders and the association which agreed to pay the bonds.⁵

In *National Bank v. Case*,⁶ the court re-affirmed their holding in *Pullman v. Upton*,⁷ that one to whom stock has been transferred in pledge or as collateral security for money loaned, and

¹ *Case v. Bank*, 100 U. S. 446; *Minor v. Mechanics' Bank of Alexandria*, 1 Peters, 46; *Wild v. Bank*, 3 Mass. 505; *Smith v. Northampton Bank*, 4 Cush. 1, 11; *Lloyd v. The West Branch Bank*, 15 Pa. St. 172; *The Bank of Vergennes v. Warren*, 7 Hill, 91; *Franklin Bank v. Steward*, 37 Me. 519, 522; *The Commercial Bank of Buffalo v. Kortright*, 22 Wend. 348, 350; *Kortright v. The Commercial Bank of Buffalo*, 20 Wend. 91.

² 99 U. S. 25.

³ *Commissioners of Knox County v.*

Aspinwall, 21 How. 539; *Gelpeke v. City of Dubuque*, 1 Wall. 175; *The City v. Lamson*, 9 Wall. 477; *City of Lexington v. Butler*, 14 Wall. 282; *Clark v. Iowa City*, 20 Wall. 583; *Town of Genoa v. Woodruff*, 92 U. S. 502.

⁴ *Amy v. Dubuque*, 98 U. S. 470; *Clark v. Iowa City*, 20 Wall. 583.

⁵ *National Bank v. Grand Lodge*, 98 U. S. 123.

⁶ 99 U. S. 628.

⁷ 96 U. S. 228.

who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors;¹ the reasons being, (1) That he is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representations he has made. (2) That by taking the legal title he has released the former owner; and (3) That after having taken the apparent ownership, and thus become entitled to receive dividends, vote at elections, and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder. The court further held that the fact of a transfer of the stock having been made by the bank when the corporation of which the stock was held was in a failing condition, to a third party, who was bound to re-transfer it when required to do so, was merely colorable; made to escape responsibility, and void.²

Bonds were partially prepared for issue by a railway company in Louisiana. They promised to pay £225 sterling in London, or \$1000 in New York, to the bearer, the president of the company to fix the place of payment by indorsement. This was never done, nor were the bonds ever issued, but were seized and carried off during the war. After several of the coupons which were attached were overdue, the bonds were purchased in New York for a very small consideration. On appeal by the holders, after an adverse decision in the Circuit Court, the United States Supreme Court held,³ that the appellants had abundant cause to question the integrity of the bonds; that they were affected with notice of their invalidity, and could not be allowed to sustain the position of *bonâ fide* holders without notice. The presence of the past-due and unpaid coupons was itself an evidence of dishonor, sufficient to put the purchasers on inquiry. The imperfection as to the place of payment was another strong evidence of want of genuineness. While, generally, it is not necessary for the validity of a bond that it should name a place of payment, the bonds in this case expressly declared that they were to be payable at the place which should be determined by the president's indorsement, and that the sum payable, whether £225 sterling or \$1000, should depend on that indorsement, and yet no indorsement appeared

¹ *Adderly v. Storm*, 6 Hill, 624; *Roosevelt v. Brown*, 11 N. Y. 148; *Holyoke Bank v. Burnham*, 11 Cush. 183; *Magruder v. Colston*, 44 Md. 349; *Crease v. Babcock*, 10 Metc. 525; *Wheelock v. Kost*, 77 Ill. 296; *Matter of the Empire City Bank*, 18 N. Y. 199; *Hale v. Walker*, 31 Iowa, 344.

² *Williams's Case*, L. R. 9 Eq. 225, n.;

Payne's Case, *Ib.* 223; *Kintrea's Case*, L. R. 5 Ch. 95; *Chinnock's Case*, Johns. (Eng.) 714; *Hyam's Case*, 1 De G. F. & J. 75; *Budd's Case*, 3 De G. F. & J. 296; *Nathan v. Whitlock*, 9 Paige, 152; *McClaren v. Franciscus*, 43 Mo. 452; *Marey v. Clark*, 17 Mass. 329; *Johnson v. Laffin*, 6 Cent. Law Jour. 131.

³ *Parsons v. Jackson*, 99 U. S. 434.

thereon. While this defect might not have invalidated the bonds if they had in fact been issued by the company, and the amount had been certain,¹ yet it was a pregnant warning to the purchasers to inquire whether they had been issued or not. These facts, taken in connection with the price at which the bonds were offered, were held abundantly sufficient to affect the purchasers with notice of invalidity in their issue. The circumstances went farther than merely to cast a shade of suspicion on the bonds. They were so pointed and emphatic as to be *prima facie* inconsistent with any other view than that there was something wrong in the title.²

¹ See *Angle v. N. W. Life Ins. Co.*, 92 U. S. 330; *Bank of Pittsburg v. Neal*, 22 How. 96; *Redlich v. Doll*, 54 N. Y. 234; *Garrard v. Haddan*, 67 Pa. 82; *Montague v. Perkins*, 22 Eng. L. & Eq. 516; *Fleckner v. United States Bank*, 8 Wheat. 338; *Mitchell v. Culver*, 7 Cow. 336; *Mechanics' Bank v. Schuyler*, 7 Cow. 337; *Boyd v. Brotherson*, 10 Wend. 93; *Flint v. Craig*, 59 Barb. 319; *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11. In *Redlich v. Doll*, 54 N. Y. 234, the maker of a note left a blank after the word "at," which was filled up by the holder with the name of a bank and negotiated. The court held that the insertion of the place of payment in the note did not avoid it in the hands of a *bona fide* holder for value, upon the principle that where one of two innocent parties must suffer by the fraud or wrong of a third person, the one who put it in the power of such third person to commit the fraud or wrong must bear the loss. In *Mitchell v. Culver*, 7 Cow. 336, a note was made and indorsed on November 27, payable in sixty days, the note as to date being blank. By direction of the maker, the plaintiff filled the blank with the 5th November. It was held, in a suit against the indorser, that where the indorser of a note commits it to the maker with the date in blank, the note carries on the face of it an implied authority to fill up the blank. See *Page v. Morrell*, 3 Keyes, 117; *Van Duzer v. Howe*, 21 N. Y. 531; *Vallett v. Parker*, 6 Wend. 616; *Kitchen v. Place*, 41 Barb. 465. In *Young v. Grote*, 4 Bing. 253, a husband left blank checks with his wife, signed by himself. In filling up one with "fifty pounds," she left a space before the word "fifty," which was filled up by her husband's clerk with the words "three hundred and." The banker having paid the whole amount, it was held that the loss must fall upon the drawer, on the ground of his negligence. A party purchasing negotiable paper in open market, without reason for suspecting fraud, and without actual notice or

knowledge of any defects or irregularities in the issue, as a *bona fide* purchaser for value, takes a good title. *Murray v. Lardner*, 2 Wall. 110; *County of Ray v. Vansycle*, 96 U. S. 675; *Goodman v. Simonds*, 20 How. 343; *Galveston R. R. v. Cowdrey*, 11 Wall. 459; *Hotchkiss v. National Bank*, 21 Wall. 354; *Cromwell v. County of Sac*, 96 U. S. 51; *San Antonio v. Mehaffy*, *Id.* 312; *Henderson v. Anderson*, 3 How. 73; *Morgan v. Railroad Co.*, 96 U. S. 716; *Duncan v. Scott*, 1 Camp. 100; *Marston v. Allen*, 8 M. & W. 494; *Harvey v. Towers*, 6 Ex. 656; *Putnam v. Sullivan*, 4 Mass. 45; *Ingham v. Primrose*, 7 C. B. N. S. 82, 85; *Awde v. Dixon*, 6 Ex. 869; *Stagg v. Elliott*, 12 C. B. N. S. 373; *Rex v. Hales*, 17 How. St. Tr. 161; *Swan v. North British, &c. Co.*, 2 H. & C. at p. 184, *per* Byles, J.

² See *Andrews v. Pond*, 13 Pet. 65; *Fowler v. Brantley*, 14 Pet. 318. And in some cases where negotiable paper has been obtained fraudulently, without any negligence on the part of the person defrauded, it has been held void even in the hands of a *bona fide* purchaser, without notice or knowledge, and without any reason apparent to cause him to suspect the *bona fides* of the transaction. Thus in *Foster v. Mackinnon*, L. R. 4 C. P. 704, the defendant was induced to put his name upon the back of a bill of exchange by the fraudulent representation of the acceptor that he was signing a guarantee. In an action against him as indorser, at the suit of a *bona fide* holder for value, the jury were directed that "if the defendant's signature was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowledge that it was a bill, and under the belief that it was a guarantee, and if he was not guilty of any negligence in so signing the paper, he was entitled to the verdict." A verdict having been rendered for the defendant, this was held a proper direction. The facts in the case are peculiar. The defendant was a gentle-

While it is undoubtedly true that it is essential to a sale that both parties should consent to it, yet the intent to sell, or the as-

man far advanced in years. The secretary of a company (which was engaged in building a railway near the defendant's property) obtained a guarantee from the defendant for £3000, in order to enable the company to obtain an advance of money from their bankers, which was duly paid without any liability resulting to the defendant. Subsequently the secretary took a bill of exchange for £3000, which was drawn and indorsed by one Cooper, and asked the defendant to put his name on it, telling him it was a guarantee; whereupon the defendant, believing that he was signing a guarantee similar to that which he had before given, put his signature on the back of the bill, immediately after that of Cooper. The defendant was only shown the back of the paper. It was, however, in the ordinary shape of a bill of exchange, and bore a stamp, the impress of which was visible through the paper. The court, in deciding the case, said:—

“It seems plain on principle and on authority that if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs, then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and, therefore, in contemplation of law never did sign, the contract to which his name is appended.” *Thoroughgood's Case*, 2 Co. R. 9 *b*; *Keilw.* 70, pl. 6; *Comm. Dig. Fuit*, B. 2; *Edwards v. Brown*, 1 C. & J. 312, and *Swan v. North British, &c. Co.*, 2 H. & C. 175, were cited to show that this principle applied to deeds; and the court continued: “But the principle is equally applicable to other written contracts. Nevertheless, this principle, when applied to negotiable instruments, must be and is limited in its application. These instruments are not only assignable, but they form part of the currency of the country. A qualification of the general rule is necessary to protect innocent transferees for value. If, therefore, a man write his name across the back of a blank bill stamp, and part with it, and the paper is afterwards improperly filled up, he is lia-

ble as indorser. If he write it across the face of the bill, he is liable as acceptor when the instrument has once passed into the hands of an innocent indorsee for value before maturity, and liable to the extent of any sum which the stamp will cover. In these cases, however, the party signing knows what he is doing; the indorser intends to indorse, and the acceptor intended to accept, a bill of exchange to be thereafter filled up, leaving the amount, the date, the maturity, and the other parties to the bill undetermined. But in the case now under consideration the defendant, according to the evidence, if believed, and the finding of the jury, never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature. It was not his design, and if he were guilty of no negligence it was not even his fault, that the instrument he signed turned out to be a bill of exchange. It was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album, or on an order for admission to the Temple Church, or on the fly-leaf of a book, and there had already been without his knowledge a bill of exchange or a promissory note payable to order inscribed on the other side of the paper. To make the case clearer, suppose the bill or note on the other side of the paper in each of these cases to be written at a time subsequent to the signature, then the fraudulent misapplication of that genuine signature to a different purpose would have been a counterfeit alteration of a writing with intent to defraud, and would therefore have amounted to a forgery. In that case the signer would not have been bound by his signature, for two reasons: first, that he never in fact signed the writing declared on; and, secondly, that he never intended to sign any such contract. In the present case the first reason does not apply, but the second reason does apply. The defendant never intended to sign that contract or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the actual contents of the instrument.”

This case is a breaking in, but we think a very sound one, on the rule laid down by the same judge (Byles, J.) who delivered the judgment in *Foster v. Mackinnon*, L. R. 4 C. P. 704, in his judgment in *Swan v. North British, &c. Co.*, 2 H. & C. at p. 184, where he says: “The object of the law-merchant as to bills and notes

sent of the former owner to a sale, need not be expressly given. It may be inferred from the nature of the transaction. Thus,

made or become payable to bearer is to secure their circulation as money; therefore, honest acquisition confers title. To this despotic but necessary principle the ordinary rules of the common law are made to bend. The misapplication of a genuine signature written across a slip of stamped paper (which transaction, being a forgery, would in ordinary cases convey no title) may give a good title to any sum fraudulently inscribed, within the limits of the stamp, and in America, where there are no stamp-laws, to any sum whatever. Negligence in the maker of an instrument payable to bearer makes no difference in his liability to an honest holder for value; the instrument may be lost by the maker without his negligence, or stolen from him, still he must pay." Byles, J., qualified this by saying: "If that be right it can only be with reference to the case of a complete instrument; it can hardly be applicable to a case where a man's signature has been obtained by a fraudulent representation to a document which he never intended to sign." *Foster v. Mackinnon*, L. R. 4 C. P. at p. 769. Suppose a clerk in handing a letter for a merchant to sign had fraudulently inserted a blank sheet of paper under the letter, with a manifold-letter sheet intervening, so as to obtain the merchant's signature on the blank sheet, and then were to write a promissory note above the blank signature, this clearly would be a case where the signature would no more bind the merchant than though the signature were not his at all, but was a forgery in fact, as it would be, for criminal purposes at least, in law. This would clearly come within the exception admitted by Parsons, C. J., in *Putnam v. Sullivan*, 4 Mass. at p. 54, where he says: "It is further objected that if the writing of this note under these circumstances is not a forgery, yet it is such a fraud as will discharge the indorsers against an innocent indorsee. The counsel for the defendants agree that generally an indorsement obtained by fraud shall hold the indorsers according to the terms of it; but they make a distinction between the cases where the indorser through fraudulent pretences has been induced to indorse the note he is called on to pay, and where he never intended to indorse a note of that description, but a different note, and for a different purpose. Perhaps there may be cases in which this distinction ought to prevail; as if a blind man had a note falsely and fraudulently read to him, and he indorsed it, supposing it to be the note read to him.

But we are satisfied that an indorser cannot avail himself of this distinction but in cases where he is not chargeable with any laches or neglect or misplaced confidence in others." In *Nance v. Lary*, 5 Ala. 370, the defendant signed a paper with the intention that a bond should be written on it. This intention was changed, and was so expressed and understood by the parties present, among whom was one Langford, who fraudulently retained the sheet containing the blank signature, and wrote a promissory note on it. The court held that the defendant was not liable to an indorsee for value without notice. The court say: "The making of the note by Langford was not a mere fraud upon the defendant; it was something more. It was quite as much a forgery as if he had found the blank or purloined it from the defendant's possession. If a recovery was allowed upon such a state of facts, then every one who ever indulges the idle habit of writing his name for mere pastime, or leaves sufficient space between a letter and his subscription, might be made a bankrupt by having promises to pay money written over his signature. Such a decision would be alarming to the community, has no warrant in law, and cannot receive our sanction."

This case was distinguished from other cases decided in the same court — *Braham v. Ragland*, 3 Stew. 260; *Roberts v. Adams*, 8 Port. 297; *Herbert v. Huie*, 1 Ala. 18 — on the ground that in these cases authority was conferred by the persons signing the blanks to use them for some purpose, and the liability is placed upon the ground that though the power was abused, innocent holders of paper should not be the losers. We think a better ground upon which such cases should be made to rest, as in the case of *Foster v. Mackinnon*, L. R. 4 C. P. 764, is as to whether there has been "negligence" on the part of the person signing the paper, which is, as it was in that case, a question for the jury on the facts; and we think that, as in that case, great stress in deciding the question as to negligence should be placed on the manner in which the blank signature has been obtained. If given for the purpose of being used as the signature of a maker or indorser of a note, then, as was said, with reference to the latter, by Lord Mansfield, in *Russell v. Langstaffe*, 2 Doug. 514, 516, "The indorsement on a blank note is a letter of credit for an indefinite sum." But when not so done, where the signature is obtained for another purpose, such as either of those

in *Ketchum v. Duncan*,¹ it was held that a banking house was purchasing interest-coupons and not paying or extinguishing them, when the coupons were received by the banking house without any intention of extinguishing them; without cancelling them; without receiving any checks for them by the company liable for them, and without having any vouchers for the coupons other than the coupons themselves. The fact of their production uncanceled raises a presumption from their possession that the holder of them became the holder of them in the usual course of business, for value, at their date, and before they became payable; and this presumption becomes conclusive when it is shown, (1) That the coupons have not been paid by the parties liable to pay them; (2) That they were not paid with money or funds furnished by those par-

named by Byles, J., in *Foster v. Mackinnon*, L. R. 4 C. P. at p. 712; then, we think, the party signing the paper is no more liable as the maker or indorser of a promissory note which he has never made, nor expressly or impliedly authorized to be made, simply because a document in the form of a promissory note has been fraudulently written in connection with his signature, than the indorser of a promissory note is, where an alteration in the promissory note has been made subsequent to his indorsement, without authority from him, either express or to be implied from the facts. Thus, in *McGrath v. Clark*, 56 N. Y. 34, the defendant indorsed a promissory note, with the time and place of payment in blank, and delivered the same to the maker, who filled the blanks and added the words "with interest." It was held that while the delivery of the note to the maker gave him an implied authority to fill the blanks by inserting any time and place of payment he chose, it did not authorize the addition of the words "with interest;" and this was a material alteration which invalidated the note as against defendant, in the absence of proof of some authority therefor, aside from the delivery. And see *Woodworth v. Bank of America*, 19 Johns. 391; *Clute v. Small*, 17 Wend. 238; *Dewey v. Reed*, 40 Barb. 21; *Miles v. Starr*, 2 Bailey, 359; *Waterman v. Vose*, 43 Me. 504; *Holmes v. Trumper*, 22 Mich. 427; *Fulmer v. Leitz*, 68 Pa. 237; *Hoffner v. Wenrich*, 32 Pa. 423; *Kountz v. Kennedy*, 63 Pa. 187; *Garvard v. Hadden*, 67 Pa. 82; *Britton v. Darker*, 46 Mo. 591; *Boyd v. Brotherson*, 10 Wend. 93; *Bruce v. Wescott*, 3 Barb. 374; *Clute v. Small*, 17 Wend. 238; *Nazro v. Fuller*, 24 Wend. 374.

We think it is well stated by Byles, J., that it is plain, on principle and on au-

thority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature, — in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended. *Foster v. Mackinnon*, L. R. 4 C. P. at p. 711. This principle is, clearly, quite as applicable to any other case where a signature is wrongfully obtained; there being in the one case, as in the other, no negligence. See further, *Angle v. N. W. Life Ins. Co.*, 92 U. S. 339; *Taylor v. The Great Indian, &c. Ry. Co.*, 4 De G. & J. 558; *Michigan Bank v. Eldred*, 9 Wall. 544.

With reference to the question decided in *Parsons v. Jackson*, 99 U. S. 434, it is elementary law that a person who takes a bill which bears on its face evidence of being dishonored or of *malu fides*, cannot be allowed to claim the privileges which belong, ordinarily, to a *bona fide* holder, without notice, of negotiable paper. *Andrews v. Pond*, 13 Pet. 65; *Fowler v. Brantley*, 14 Pet. 318. If he chooses to receive it under such circumstances, he takes it with all the infirmities belonging to it; and is in no better condition than the person from whom he received it. *Crossley v. Ham*, 13 East, 498.

¹ 96 U. S. 659.

ties; nor (3) By any one in pursuance of an agreement with those parties to pay them for or on behalf of the debtors, or in extinguishment of the debt.

In an action against a corporation by a *bonâ fide* holder of its bonds, the plaintiff is not affected by fraud and irregularities touching their issue, and in disposing of them, nor by the fact that the corporation was not organized within the time limited by its charter.¹ In *Kayser v. Trustees of Bremen*,² it was held that it could not be shown in defence to a suit of a corporation that the charter was obtained by fraud; neither can it be shown that the charter has been forfeited by misuser or non-user. Advantage can only be taken of such forfeiture by process on behalf of the State, instituted directly against the corporation for the purpose of avoiding its charter; and individuals cannot avail themselves of it in collateral suits until it is judicially declared.³ Nor is it material that, at the time of the purchase of the bonds, proceedings had been taken and were pending to annul the bonds, if the holder is a *bonâ fide* owner for value of the bonds, before maturity, and without notice.⁴

One who contracts with an acting corporation cannot defend himself against a claim in such contract, in a suit by the corporation, by alleging the irregularity of its organization.⁵ The same principle applies to the case of a subscription to the capital stock in an organization which has attempted irregularly to create itself into a corporation, and has acted as such.⁶ The rule applies to increasing the stock of a corporation when the question arises upon paying a subscription for stock forming a part of such increase. The duty and the necessity of performing the contract of subscription are the same as in the case of an original stockholder.⁷

An assignee appointed under the bankrupt laws of the United States represents both the corporation and its creditors, and the defence of irregular organization cannot be urged against him. In an action by such assignee to recover unpaid subscriptions upon stock in such an organization, the defence of false and fraudulent representations inducing such subscription, cannot be set up; especially when the subscriber has not been vigilant in discovering such fraud, and in repudiating his contract. And one

¹ *County of Macon v. Shores*, 97 U. S. 272.

² 16 Mo. 88.

³ See also *Smith v. County of Clarke*, 54 Mo. 58, to the same effect.

⁴ *County of Macon v. Shores*, 97 U. S. 272.

⁵ *Dutchess Collar Manuf. Co. v. Davis*, 14 Johns. 237; *Sanger v. Upton*, 91 U. S.

56; *Upton v. Tribilecock*, *Ibid.* 45; *Buffalo & Alleghany R. R. Co. v. Cary*, 26 N. Y. 75; *Bissell v. Michigan Central R. R. Co.*, 22 N. Y. 258.

⁶ *Methodist Episcopal Church v. Pickett*, 19 N. Y. 482; *Upton v. Hamborn*, 3 Biss. 417.

⁷ *Chubb v. Upton*, 95 U. S. 665.

who receives a certificate of stock for a certain number of shares, at a given sum per share, thereby becomes liable to pay the amount thereof when called upon by the corporation or its assignee.¹ Nor is it necessary, to sustain the action, that there should have been a subscription for the whole amount named on the articles.²

Where the name of an individual appears on the stockbook of a corporation as a stockholder, the *primâ facie* presumption is that he is the owner of the stock, in a case where there is nothing to rebut that presumption; and in an action against him as a stockholder, the burden of proving that he is not a stockholder, or of rebutting that presumption, is cast upon the defendant.³

The names of the owners of stock certificates having been forged to the transfers of stock, transfers of the stock were made by the company on their books, and the stocks were sold. On bill filed against the company, it was decreed that the plaintiffs should have their names replaced on the books of the company, and proper certificates issued to them, and be paid the dividends which accrued on the shares after the unauthorized transfers; or

¹ Upton v. Tribilcock, 91 U. S. 45; Webster v. Upton, *Id.* 65; Sanger v. Upton, *Id.* 56; Ogilvie v. Knox Ins. Co., 22 How. 380; Chubb v. Upton, 95 U. S. 665.

² Rensselaer & Washington Plank Road Co. v. Westel, 21 Barb. 56. The acceptance and holding of a certificate of shares in an incorporation makes the holder liable to the responsibilities of a shareholder. Brigham v. Mead, 10 Allen, 245; Buffalo City R. R. Co. v. Douglass, 14 N. Y. 336; Seymour v. Sturges, 26 N. Y. 134. The obligation of the subscriber to pay his subscription cannot be released or surrendered to him by the trustees of the company. The capital paid in, and promised to be paid in, is a fund which the trustees cannot squander or give away. They are bound to call in what is unpaid, and carefully to husband it when received. Sawyer v. Hoag, 17 Wall. 610; Tuckerman v. Brown, 33 N. Y. 297; Ogilvie v. Knox Ins. Co., 22 How. 380; Osgood v. Laytin, 3 Keyes, 521.

³ Turnbull v. Payson, 95 U. S. 418; Hoagland v. Bell, 36 Barb. 57; Plank Road v. Rice, 7 Barb. 162; Turnpike Road v. Van Ness, 2 Cranch, C. C. 451; Mudgett v. Herrell, 33 Cal. 25; Coffin v. Collins, 17 Me. 440; Merrill v. Walker, 24 Me. 237. In Turnbull v. Payson, 95 U. S. 418, the defendant denied that he was a stockholder in a bankrupt company, in which it was sought to charge him with liability in proportion to stock standing in his

name. The books of the corporation, in which the name of the defendant was entered as the owner of fifty shares, and the stock-book of the company, with a duplicate of the stock certificate issued to the defendant, showing that he was the owner of that number of the shares of the capital stock, were in evidence. Testimony was also introduced to prove that the certificate was sent to the agents of the company, to be delivered to the defendant when he paid twenty per cent of the shares; and that he made the required payment. The jury having found that the defendant was a stockholder, as alleged, the court held that satisfactory proof having been exhibited that the company was duly incorporated and organized, it followed that the evidence given, taken in connection with the fact, also proved, of the receipt by the defendant of a dividend upon the shares standing upon the books of the company in his name, was conclusive to show the liability of the defendant; there being no contradiction of such evidence. Upton v. Hansbrough, 10 Natl. Bkr. Reg. 369; *In re Bank*, 12 N. Y. 17; Alder v. Bank, 13 Wis. 61; Ward v. Manuf. Co. 16 Conn. 593. Where a company becomes bankrupt, the stockholders are liable to the assignee for the unpaid portion of their stock, which is recoverable in the district court. Turnbull v. Payson, 95 U. S. 418.

have alternative judgments for the value of the shares and dividends.¹

An assignee of corporate stock, who has caused it to be transferred to himself on the books of the company, and holds it as collateral security for a debt due from his assignor, is liable for unpaid balances thereon to the company, or to the creditors of the company, after it has become bankrupt.²

The capital stock of a company, especially its unpaid subscriptions, is a trust fund for the general benefit of the creditors; therefore, a transaction between a purchaser of stock designed to turn the unpaid subscription for stock into an ordinary indebtedness, is a fraud upon the public, and a set-off as between the company and the stockholder will not be allowed, as it would work an injustice to the creditors.³

In a multitude of cases decided in England and in this country, it has been determined that a subscriber for the stock of a company is not released from his engagement to take it and pay for it, by any alteration of the organization or purposes of the company which, at the time the subscription was made, was authorized, either by the general law or by the special charter; and a

¹ *Telegraph Co. v. Davenport*, 97 U. S. 369. The same doctrine has been repeatedly sustained both in England and this country. *Davis v. Bank of England*, 2 Bing. 393; *Hilgard v. South Sea Co.*, 2 P. Wms. 76; *Stoman v. Bank of England*, 14 Sim. 475; *Taylor v. Midland Ry. Co.*, 28 Beav. 287; *Ashby v. Blackwall*, 2 Eden, 299; *Lowry v. Commercial, &c. Bank, Taney, C. C. Dec.* 310; *Sewall v. Boston Water-Power Co.*, 4 Allen, 277; *Pratt v. Taunton Copper Co.*, 123 Mass. 110; *Chew v. Bank of Baltimore*, 14 Md. 299; *Pollock v. The National Bank*, 7 N. Y. 274; *Weaver v. Barden*, 49 N. Y. 286; *Cohen v. Gwynn*, 4 Md. Ch. Dec. 357; *Dalton v. Midland Railway Co.*, 22 Eng. L. & Eq. 452; *Swan v. North British, &c. Co.*, 7 H. & N. 603.

² *Pullinan v. Upton*, 96 U. S. 328. The transferee of the shares is responsible for whatever remains unpaid upon his shares; for by the transfer on the books of the corporation the former owner is discharged. It makes no difference that the legal owner, that is, he in whose name the stock stands on the books of the corporation, is in fact only, as between himself and his assignor, a holder for security of a debt, or even that he has no beneficial interest therein. *The Newry, &c. Ry. Co. v. Moss*, 14 Beav. 64; *Hoare's Case*, 2 J. & H. 229; *The Empire City Bank*, 18 N. Y. 200; *Adderley v. Storm*, 6 Hill, 624. In *Holyoake Bank v. Burn-*

ham, 11 Cush. 183, it was decided that a transfer of stock on the books of the bank, intended merely to be held as collateral security, makes the holder liable for the bank debts. It was said, the creditor is to be considered the absolute owner, and that his arrangement with his debtor cannot change the character of the ownership. And in *Wheelock v. Cost*, 77 Ill. 296, the doctrine was asserted, that when shares of stock in a banking corporation have been hypothecated, and placed in the hands of the transferee, he will be subjected to all the liabilities of ordinary owners, for the reason that the property is in his name, and the legal ownership appears to be in him. See *Fennick's Case*, 1 De G. & S. 557; *Luard's Case*, 1 De G. F. & J. 533; *Price and Brown's Case*, 3 De G. & Sm. 146; *Burlinson's Case*, 3 De G. & Sm. 18; *Pollard v. Bailey*, 20 Wall. 520; *Bank of Utica v. Smalley*, 2 Cow. 770; *Curtis v. Harlow*, 12 Met. 5.

³ *Sawyer v. Hoag*, 17 Wall. 610. See *Burke v. Smith*, 16 Wall. 390; *New Albany v. Burke*, 11 Wall. 96; *Curran v. State of Arkansas*, 15 How. 304; *Wood v. Dummer*, 3 Mason, 305; *Slee v. Bloom*, 19 Johns. 456; *Briggs v. Penniman*, 8 Cow. 387; *Trustees of Vernon v. Hall*, 6 Cow. 23; *The People v. Bank of Niagara*, 1b. 196; *Slee v. Bloom*, 20 Johns. 669; *The People v. The Washington & Warren Bank*, 6 Cow. 211.

clear distinction is recognized between the effect of such alterations, and the effect of those made under legislation subsequent to the contract of subscription. The contract is made with reference to the law existing at the time of making the contract.¹

A majority of stockholders and creditors of a railroad company being anxious to sell the railroad, the sale being opposed by other stockholders, under an arrangement between the majority and mortgagees in trust for the creditors, the railroad was sold under a friendly foreclosure of one of the mortgages. On a bill filed by the dissenting stockholders against the railroad company and the purchasers, to set aside the sale, the Supreme Court of the United States held² that the bill had been properly dismissed by the court below; the trustees and the majority holders not having been made parties to the bill, as they should have been, as their interests would be affected by the decree sought to be obtained.³

Where the appellant made a sale and assignment of his stock in a railroad company to the respondent, for valuable consideration, and then sought to set the assignment aside on the grounds of hardship, imposition, and oppression, the assignment by the appellant having been voluntary; the court decided that the fact that he was in straitened circumstances, embarrassed with litigation, and pressed for want of pecuniary means, for which the respondent was not responsible, and did nothing to cause, and that the sale and assignment were not caused by any act of violence, or threat of any kind, calculated to intimidate the party or to force the result, or to compel that consent which is the essence of every valid contract, he must abide the consequences of his own voluntary act, particularly as the arrangement was not inequitable or unconscionable. Having performed the act after he had ample time for inquiry, examination, and reflection, neither a court of equity nor of law could release him from the obligation of fulfilling his contract according to its terms.⁴

¹ *Nugent v. The Supervisors*, 19 Wall. 241; *The Cork & Youghal Ry. Co. v. Paterson*, 37 Eng. L. & Eq. 398; *Nixon v. Brownlow*, and *Nixon v. Green*, 3 H. & N. 386; *Sparrow v. The Evansville & Crawfordsville R. R. Co.*, 7 Porter (Ind.), 369; *Bishop v. Brainerd*, 28 Conn. 289; *Schenectady & Saratoga Plank-road Co. v. Thatcher*, 1 Kern. 102; *Bish v. Johnson*, 21 Ind. 299; *Hanna v. Cincinnati*, 20 Ind. 30; *Buffalo & N. Y. City R. R. Co. v. Dudley*, 4 Kern. 336; *Meadow Dam v. Gray*, 30 Me. 547; *Agricultural Branch R. R. Co. v. Winchester*, 13 Allen. 32; *Noyes v. Spaulding*, 27 Vt. 420; *Pacific R. R. Co. v. Renshaw*, 18 Mo. 210; *Fry v. Lexington*, 2 Met. 314; *Illinois River*

R. R. Co. v. Beers, 27 Ill. 189; *Terre Haute & Alton R. R. Co. v. Earp*, 21 Ill. 292.

² *Ribon v. Railroad Companies*, 16 Wall. 446.

³ See *Caldwell v. Taggart*, 4 Peters, 190; *Story v. Livingston*, 13 Peters, 359; *Marshall v. Beverley*, 5 Wheat. 313; *Coy v. Mason*, 17 How. 580; *Russell v. Clark's Exrs.*, 7 Cranch, 69.

⁴ *French v. Shoemaker*, 14 Wall. 214. A contract or written obligation procured by means of duress is inoperative and void both at law and in equity. And actual violence, even at common law, is not necessary to establish duress, because consent is of the very essence of a contract;

Where bankers received stock certificates from a trustee (the certificates showing on their face that they were held in trust), for loans made by them to the trustee, the loans being for his own private benefit, they are liable to account to the *cestuis que trust* for the value of the stock. The statement in the certificates that they are held in trust is actual or constructive notice to the bankers, and puts them on inquiry, so that they take them at their peril when they receive them as security for the trustee's own debts.¹

Subscribers for stock, who have not paid up their subscriptions, but have *bonâ fide* assigned their stock, and the assignees have been duly substituted for the original subscribers, will not be held liable to the creditors of the company.²

Bonâ fide purchasers of railway bonds purchased them in good faith in the open market, the parties supposing them to be valid obligations of the railway company, and purchasing them as such for a valuable consideration, they are *bonâ fide* holders for value of such bonds, and will be protected as such, though the bonds may have been improvidently issued by the company.³

and if there be compulsion there is no actual consent. And moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is everywhere regarded as sufficient in law to destroy free agency, without which there can be no contract, because in that state of the case there is no consent. *Brown v. Pierce*, 7 Wall. 214; *Foshay v. Ferguson*, 5 Hill, 158; *Central Bank v. Copeland*, 18 Md. 317; *Eadie v. Slimmon*, 26 N. Y. 12; *Harmony v. Bingham*, 12 N. Y. 99; *Fleetwood v. New York*, 2 Sandf. 475; *Tutt v. Ide*, 3 Blatchf. 250; *Astley v. Reynolds*, 2 Str. 915; *Brown v. Peck*, 2 Wis. 277; *Oates v. Hudson*, 5 Eng. L. & Eq. 469. Where there is an arrest for an improper purpose, without just cause, or where there is an arrest for a just cause, but without lawful authority, or for a just cause, but for an unlawful purpose, even though under proper process, it may be considered as duress of imprisonment; and if the person arrested execute a contract or pay money for his release, he may avoid the contract as one procured by duress, or he may recover back the money in an action for money had and received. *Richardson v. Duncan*, 3 N. H. 508; *Watkins v. Baird*, 6 Mass. 511; *Strong v. Grannis*, 26 Barb. 124.

¹ *Duncan v. Jaudon*, 15 Wall. 165. In *Lowry v. Commercial & Farmers' Bank of Maryland*, Tan. C. C. Dec. 310, which was a case of misappropriation of corporate stock by an executor, Taney, C. J.,

held that if a party dealing with an executor has at the time reasonable ground for believing that he intends to misapply the money, or is, in the very transaction, applying it to his private use, the party so dealing with the executor is responsible to the persons injured. And *Shaw v. Spencer*, 100 Mass. 389, decides that if a certificate of stock, expressed in the name of "A. B., trustee," is by him pledged to secure his own debt, the pledgee is, by the terms of the certificate, put on inquiry as to the character and limitations of the trust, and if he accepts the pledge without inquiry, he does so at his peril. *Sturtevant v. Jaques*, 14 Allen, 523; *Bancroft v. Cousen*, 13 Allen, 50; *Trull v. Trull*, 13 Allen, 407; *Hutchins v. State Bank*, 12 Met. 421; *Hill v. Simpson*, 7 Ves. 152; *Field v. Schieffelin*, 7 Johns. Ch. 150; *Petrie v. Clark*, 11 S. & R. 377; *Walker v. Taylor*, 4 L. T. S. S. 845; *Buttrick v. Holden*, 13 Met. 355; *Calais Steamboat Co. v. Van Velt*, 2 Black, 377. See, as to the extent to which purchasers from trustees are put on inquiry, *Ashton v. Atlantic Bank*, 3 Allen, 217; *Albert v. Savings Bank*, 1 Md. Ch. 408; *Atkinson v. Atkinson*, 8 Allen, 15; *Pennsylvania Life Ins. Co. v. Austin*, 42 Pa. 257; *Garrard v. Pittsburg, &c. Co.*, 29 Pa. 154; *Dodson v. Simpson*, 2 Rand. 294; *Tillinghast v. Champlin*, 4 R. I. 172, 213; *McLeod v. Drummond*, 14 Ves. 353.

² *Burke v. Smith*, 16 Wall. 390.

³ *Galveston R. R. Co. v. Cowdrey*, 11 Wall. 459.

Railroad certificates were issued to stockholders in lieu of their stock. The court held that they were not necessarily negotiable, simply because, by their terms, they enure to the benefit of the bearer. They were assignable, and would have been so if the word "bearer" had been omitted, but they were not negotiable instruments in the sense that when transferred, the equities which had previously attached to them did not follow them.¹

As against innocent purchasers for value of bonds guaranteed by a corporation, a stockholder of the corporation, who was present at a meeting called to ratify the act of the board in making the guaranty, and who declined to vote against a resolution ratifying the act, will not be permitted to contest the validity of the guaranty which could not have passed if he had voted against it.²

Where subscribers to the stock of an insurance company pay an instalment of their subscriptions, give their securities for the balance, and conduct the business for several years in the expectation of large profits, they are not relieved from paying those securities, as between themselves and the creditors of the company, because the agent of the corporation, who took the subscriptions of stock, made certain representations concerning the state of the affairs of the corporation which were not true.³

¹ Railroad Co. v. Howard, 7 Wall. 392; Mechanics' Bank v. Railroad Co., 13 N.Y. 599. Valid contracts made by a corporation survive even its dissolution by voluntary surrender or sale of its corporate franchises; and the creditors of the corporation, notwithstanding such surrender or sale, may still enforce their claims against the property of the corporation as if no such surrender or sale had taken place. Moneys derived from the sale and transfer of the franchises and capital stock of an incorporated company are assets of the corporation, and as such constitute a fund for the payment of its debts; and if held by such corporation itself, and so invested as to be subject to legal process, the fund may be levied on by such process; but if the fund has been distributed among the stockholders, or passed into the hands of other than *bonâ fide* creditors or purchasers, leaving any debts of the corporation unpaid, the established rule in equity is, that such holders take the fund charged with the trust in favor of creditors, which a court of equity will enforce, and compel the application of the same to the satisfaction of their debts. Railroad Co. v. Howard, 7 Wall. 410; Mumma v. Potomac Co., 8 Peters, 286; Wood v. Dummer, 3 Mason, 308; Vose v. Grant, 15 Mass. 522; Spear v. Grant, 16 Mass. 14; Curran v. Arkansas, 15 How. 307.

² Zabriskie v. The Cleveland, &c. Ry. Co., 23 How. 381. And see Chapman v. Mad River Ry. Co., 6 Ohio, N. S. 119; The State v. Van Horne, 7 Ohio, N. S. 327; where the Supreme Court of Ohio recognized the obligation of corporators to be prompt and vigilant in the exposure of illegality or abuse in the employment of their corporate powers, and denied assistance to those who waited till the evil had been done, and the interest of innocent parties had become involved.

³ Ogilvie v. The Knox Insurance Co., 22 How. 380. In order to obtain relief in such a case, prompt action is required. The party who seeks to be relieved on the ground of fraud will fail where there is laches or acquiescence on his part. Musson v. Bovet, 1 Denio, 69; Wheaton v. Baker, 14 Barb. 594; Mann v. Worrall, 16 Barb. 221. He who has been induced to part with his property on a fraudulent contract may, on disclaiming the fraud, avoid the contract and claim a return of his property. Fraud destroys the contract, and the fraudulent purchaser acquires no title. But a party who would disaffirm a fraudulent contract must act promptly upon discovering the fraud, and he must return or offer to return whatever he has received upon it. He cannot retain what he has received, if it is of any value, and proceed to recover the property fraudulently purchased of him. He must

5. MUNICIPAL CORPORATION TRANSACTIONS, SALE OF BONDS, ETC.

By an act of a State legislature, the power to issue bonds for a subscription to railway stock, by a municipality, was made conditional upon a vote of the electors. The United States Supreme Court held, in *Town of Coloma v. Eaves*,¹ in an action on such bonds, that they having been issued, indorsed with a certificate by the officers empowered to judge as to their validity, which, with the recitals in the bond themselves, showed that the bonds had been properly issued, and that all of the prerequisites to their issue had been complied with; the bonds, as between a *bonâ fide* purchaser and the municipality, were valid. The court held, that, after what had been done, it was not an open question as between a *bonâ fide* holder of the bonds and the municipality, whether all the prerequisites to their issue had been complied with. Apart from and beyond the reasonable presumption that the officers of the law, the municipality officers, discharged their duty, the matter had passed into judgment. The persons appointed to decide whether the necessary prerequisites to their issue had been completed had decided, and certified their decision. They had declared the contingency to have happened, on the occurrence of which the authority to issue the bonds was complete. Their recitals were such a decision, and beyond these a *bonâ fide* purchaser was not bound to look for evidence of things *in pais*. He is bound to know the law conferring upon the municipality power to give the bonds on the happening of a contingency; but whether that has happened or not is a question of fact, the decision of which is by the law confided to others,—to those most competent to decide upon it; and which the purchaser is, in general, in no condition to decide for himself.²

rescind the contract *in toto*, and thus place the party in the position he was in before the sale. *Cary v. Hotaling*, 1 Hill, 311; *Ash v. Putnam*, 1 Hill, 302; *Root v. French*, 13 Wend. 571; *Voorhees v. Earl*, 2 Hill, 288; *Baker v. Robins*, 2 Denio, 186; *Hogan v. Weyer*, 5 Hill, 390; *Moyer v. Shoemaker*, 5 Barb. 322, 323; *Kimball v. Cunningham*, 4 Mass. 502; *Conner v. Henderson*, 15 Mass. 319; *Coolidge v. Bingham*, 1 Met. 547.

¹ 92 U. S. 484.

² See *Knox v. Aspinwall*, 21 How. 544; *The Royal British Bank v. Torquand*, 6 El. & Bl. 327; *Moran v. Miami County*, 2 Black, 732; *Mercer County v. Hackett*, 1 Wall. 83; *Mayer v. Muscatine*, *Id.* 384; *Supervisors v. Schenk*, 5 Wall. 784; *Van Hostrop v. Madison City*, 1 Wall. 291; *St. Joseph's Township v. Rogers*, 16 Wall. 644;

Town of Venice v. Murdock, 92 U. S. 494; *County of Moultrie v. Savings Bank*, *Id.* 631; *Money v. Township of Oswego*, 92 U. S. 637. The United States Supreme Court in *The Commissioners of Douglas County v. Bolles*, 94 U. S. 104, followed and affirmed their decision in *Town of Coloma v. Eaves*, 92 U. S. 484. The principle of estoppel applies. *Commissioners of Johnson County v. January*, 94 U. S. 202; *Supervisors v. Schenk*, 5 Wall. 772; *Olcott v. The Supervisors*, 16 Wall. 698; *City of Lexington v. Butler*, 14 Wall. 283; *Pendleton County v. Amy*, 13 Wall. 298; *Myers v. Muscatine*, 1 Wall. 385; *Knox v. Aspinwall*, 21 How. 544; *Lind v. The County*, 16 Wall. 6; *St. Joseph's Township v. Rogers*, *Id.* 644; *Pine Grove v. Talcot*, 19 Wall. 666. A *bonâ fide* purchaser of municipal bonds is under

In an action against a county board of supervisors for the amount of bonds given by a county for stock, for which the county was legally authorized to subscribe, it was held that where there was a resolution of the county declaring the subscription made, an acceptance by the company, notice of the acceptance, delivery of the bonds after the duly-authorized committee of the county had decided that all the prescribed conditions precedent to the delivery of the bonds had been complied with, — the county accepting the position of a stockholder, receiving certificates for the stock subscribed, voting as a stockholder, and levying a tax to pay the interest falling due on the bonds; the validity of the bonds, and of their accompanying coupons in the hands of a *bonâ fide* holder for value, was beyond doubt, although no formal subscription was made by the county on the books of the company.¹

Bonds for the payment of money, lawfully issued by municipal corporations, when they are payable to order and are indorsed in blank, as well as the coupons attached to them as interest warrants, are transferable by delivery, and are subject to the same rules and regulations, so far as respects the title and rights of the holder, as negotiable bills of exchange and promissory notes. Holders of such instruments, if the same are indorsed in blank or are payable to bearer, are as effectually shielded from the defence of prior equities between the original parties, if unknown to them at the time of the transfer, as the holders of any other class of negotiable instruments.² And when a corporation has power under any circumstances to issue negotiable securities, the *bonâ fide* holder has the right to presume that they were issued under the circumstances which give the requisite authority, and that they are no more liable for any infirmity in the hands of such a holder than any other commercial paper.³

Mere political bodies, constituted as counties, are so constituted for the purpose of local police and administration, and, having the power of levying taxes to pay all public charges created, have no power or authority to make and utter commercial paper of any kind, unless such power is expressly conferred upon them by law, or is clearly implied from some power expressly given, which cannot be fairly exercised without it.⁴ No such implication arises

no obligation to look beyond the recital in the bonds as to the vote authorizing their issue having been sufficient, when the bonds have been duly issued and attested by the proper officers. *Township of Rock Creek v. Strong*, 96 U. S. 271; *San Antonio v. Mehaffy*, *Id.* 312.

¹ *Nugent v. The Supervisors*, 19 Wall. 241. And see *The Justices of Clark County v. The Paris, W. & K. River Turnpike Co.*, 11 B. Mon. 143.

² *City of Lexington v. Butler*, 14 Wall. 282; *Moran v. Miami County*, 2 Black, 722; *Mercer County v. Hackett*, 1 Wall. 83.

³ *City of Lexington v. Butler*, *supra*; *Gelpeke v. Dubuque*, 1 Wall. 203; *Knox County v. Aspinwall*, 21 How. 539; *Supervisors v. Schenck*, 5 Wall. 784; *Bissell v. Jeffersonville*, 24 How. 299.

⁴ *Clairborne County v. Brooks*, 111 U. S. 400, 406.

from the granting the power to a municipal corporation to appropriate moneys in aid of the construction of a railroad, accompanied by a provision directing the levy and collection of taxes to meet such appropriation, and prescribing no other mode of payment.¹

In an action against a municipality on notes given by the town treasurer, the Circuit Court held that although the vote of the town meeting standing alone did not give the treasurer general authority to borrow money and to act as general agent in that regard, yet that the evidence was sufficient to authorize the jury to find that the town voters, by continuous and affirmative action and conduct at their town meetings, knowing that their treasurer had generally and freely borrowed money and given notes under that vote, had made him in fact their general agent for that purpose; had held him out to the plaintiff as such, and had ratified his acts, and were estopped from denying their validity. But the United States Supreme Court reversed this decision.² They held that towns, such as those in the New England States, differ from trading companies, and even from municipal corporations elsewhere. They are territorial corporations, into which the State is divided by the legislature from time to time, at its discretion, for political purposes and the convenient administration of government. They have those powers only which have been expressly conferred upon them by statute, or which are necessary for conducting municipal affairs; and all the members of the town are members of the *quasi* corporation.³ A town cannot make a contract or authorize any officer or agent to make one on its behalf, except by vote in a town meeting duly notified or warned; and the notice or warning must specify the matter to be acted on, in order that all the inhabitants whose property will be subject to be taken on execution to satisfy the obligations of the town,⁴ may know in advance what business is to be transacted at the meeting. If the subject of the vote is not specified in the notice or warning, the vote has no legal effect, and binds neither the town nor the inhabitants. No one can rely upon a vote as giving him any rights against the town, without proving a sufficient notice or warning of the meeting at which the vote was passed.⁵ Any ratification of

¹ *Concord v. Robinson*, 121 U. S. 165; *Wells v. Supervisors*, 102 U. S. 625, 631; *Ogden v. County of Daviess*, *Id.* 634, 639.

² *Bloomfield v. Charter Oak Bank*, 121 U. S. 121.

³ *Granby v. Thurston*, 23 Conn. 416; *Webster v. Harwinton*, 32 Conn. 131.

⁴ *Atwater v. Woodbridge*, 6 Conn. 223, 228; *McLoud v. Selby*, 10 Conn. 390; *Beardsley v. Smith*, 16 Conn. 368; 5 *Dane Ab.* 158; *Chase v. Merrimack Bank*, 19

Pick. 564, 569; *Gaskill v. Dudley*, 6 *Met.* 546; *Adams v. Wiscasset Bank*, 1 *Greenl.* 361; *Fernald v. Lewis*, 6 *Greenl.* 264; *Hopkins v. Elmore*, 49 *Vt.* 176.

⁵ *Reynolds v. New Salem*, 6 *Met.* 340; *Stoughton School District v. Atherton*, 12 *Met.* 105; *Moor v. Newfield*, 4 *Greenl.* 44. See *Brunswick First Parish v. McKean*, 4 *Greenl.* 508; *Thayer v. Stearns*, 1 *Pick.* 109; *Gilmore v. Holt*, 4 *Pick.* 258; *Hayden v. Noyes*, 5 *Conn.* 391; *Willard*

an act previously unauthorized must, in order to bind the principal, be with full knowledge of all the material facts,¹ and no estoppel *in pais* can be created except by conduct which the person setting up the estoppel has the right to rely upon, and does in fact rely and act upon.² And the vote of those who attend a town-meeting, being of no validity against the town or its inhabitants, unless the object of the vote is set forth in the notice or warning of the meeting, the town can no more ratify an act afterwards than authorize it beforehand, except by vote passed pursuant to a previous notice specifying the object. Without the indispensable prerequisite of such a notice, those present at a town-meeting have no greater power to bind the town indirectly by ratification or estoppel, than they have to bind it directly by an original vote.³ And the court concluded ⁴ that, upon the whole case, there was no proof of original authority, or of subsequent ratification, or of estoppel, to bind the defendant town. None of original authority, for want of any vote passed pursuant to due notice in the warning; none of ratification, for the same reason, as well as because it was not shown that the acts proved were done with intent to ratify the acts of the treasurer in issuing the notes sued on, or with knowledge of all the material facts attending their issue; none of estoppel, because there was no evidence of any acts of the town which the plaintiff had a legal right to rely upon, or did in fact rely upon, in taking the notes.⁵

Where bonds on their face exclude the possibility of their having been legally issued, recitals or certificates of the officers of the

v. Killingworth, 8 Conn. 247, 254; *Brownell v. Palmer*, 22 Conn. 107; *Avery v. Stewart*, 1 Cush. 496; *Flecher v. Fuller*, 120 U. S. 534; *State v. Taft*, 37 Conn. 392; *Isbell v. New York & New Haven R. R.*, 25 Conn. 556; *Society for Savings v. New London*, 29 Conn. 174; *Baldwin v. North Brantford*, 32 Conn. 47; *New Haven, M. & W. R. R. Co. v. Chatham*, 42 Conn. 465; *Brooklyn Trust Co. v. Hebron*, 51 Conn. 22, 29.

¹ *Owings v. Hull*, 9 Pet. 607; *Ben- necke v. Insurance Co.*, 105 U. S. 355.

² *Burgess v. Seligman*, 107 U. S. 20; *Scovill v. Thayer*, 105 U. S. 143; *Brant v. Virginia Co.*, 93 U. S. 326.

³ *Marsh v. Fulton County*, 10 Wall. 676; *Daviess County v. Dickinson*, 117 U. S. 657; *Norton v. Shelby County*, 118 U. S. 425; *Pratt v. Swanton*, 15 Vt. 147; *Lander v. Smithfield School District*, 33 Me. 239; *American Tube Works v. Boston Machine Co.*, 139 Mass. 5. And see *Sharon v. Salisbury*, 29 Conn. 113; *Ladd v. Franklin*, 37 Conn. 53; *Goff v. Reho-*

both, 12 Met. 26; *Burlington v. New Haven & Northampton Co.*, 26 Conn. 51; *Benoit v. Conway*, 12 Allen, 487; *Arlington v. Pierce*, 122 Mass. 270; *Bean v. Hyde Park*, 143 Mass. 245; *Kinsley v. Norris*, 60 N. H. 131; *Railroad Bank v. Lowell*, 109 Mass. 214; *Agawam Bank v. South Hadley*, 128 Mass. 503.

⁴ *Bloomfield v. Charter Oak Bank*, 121 U. S. 137.

⁵ See *Concord v. Robinson*, 121 U. S. 165, as to municipal bonds, invalid in the hands of purchasers before maturity without notice, notwithstanding their recitals, their issue having been without statutory authority. See also *Middleport v. Etna Life Insurance Co.*, 82 Ill. 562, 568; *Aspinwall v. County of Daviess*, 22 How. 364; *Wadsworth v. Supervisors*, 102 U. S. 534; *Crow v. Oxford*, 119 U. S. 215; *Katzemberger v. Aberdeen*, 121 U. S. 172; *Dixon County v. Field*, 111 U. S. 92; *Sykes v. Mayor of Columbus*, 55 Miss. 115; *Granada County Supervisors v. Brogden*, 112 U. S. 271.

municipality that they were legally issued will not avail to render such bonds legal. Recitals or certificates reciting the actual facts, and alleging that thereby the bonds were conformable to the law, when, judicially speaking, they were not, will not make them so; nor will such recitals or certificates work an estoppel upon the municipality to claim the protection of the law.¹

The doctrine which gives validity to acts of officers *de facto*, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby; offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices, and in apparent possession of their powers and functions. For the good order and peace of society, their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result if in every proceeding before such officers their title could be called into question. But the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office, and a public office can only exist by force of law. An unconstitutional act, which in terms creates an office, does not, by the apparent existence of the office, give validity to the acts of the assumed incumbent. An unconstitutional act is not a law. It confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never passed.²

¹ *Crow v. Oxford*, 119 U. S. 215; *Dixon County v. Field*, 111 U. S. 83. If the officers authorized to issue bonds upon a condition are not the appointed tribunal to decide the fact which constitutes the condition, their recital will not be accepted as a substitute for proof. In other words, where the validity of a bond depends upon an estoppel, claimed to arise upon the recitals of the instrument, the question being as to the existence of power to issue them, it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals and to make them conclusive. The very ground of the estoppel is that the recitals are the official statements of those to whom the law refers the public for authentic and final information on the subject. This is the rule which has been constantly applied by the Supreme Court of the United States in the numerous cases in which it has been involved. The differences in the result of

the judgments have depended upon the question whether, in the particular case under consideration, a fair construction of the law authorized the officers issuing the bonds to ascertain, determine, and certify the existence of the facts upon which their power by the terms of the law was made to depend, not including that class of cases in which the controversy related, not to conditions precedent, on which the right to act at all depended, but upon conditions affecting only the mode of exercising a power admitted to have come into being. *Marey v. Township of Oswego*, 92 U. S. 637; *Commissioners of Douglas County v. Bolles*, 94 U. S. 104; *Commissioners of Marion County v. Clark*, *Ib.* 278; *County of Warren v. Marey*, 97 U. S. 96; *Pana v. Bowler*, 107 U. S. 529.

² *Norton v. Shelby County*, 118 U. S. 425; *Hildreth v. McIntyre*, 1 J. J. Marsh. 206; *Carleton v. The People*, 10 Mich. 250, 259. See *The State v. Carroll*, 38

The court, in *Norton v. Shelby County*,¹ where it was claimed that bonds of the county, which had been issued without authority, were subsequently ratified, in holding that the bonds were invalid, adopted the principles laid down in *Marsh v. Fulton County*,² that a ratification is, in its effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified. Officials who had no power to make a subscription in the first instance without a vote of the county, could not ratify such subscription without such authorization. It would be absurd to say that they could without such vote, by simple expressions of approval, or in some other indirect way, give validity to acts, when they were in terms directly prohibited by statute from doing those acts until after such vote was had. That would be equivalent to saying that an agent, not having the power to do a particular act for his principal, could have validity given to such act by its indirect recognition.³

Conn. 449; *Taylor v. Skrine*, 3 Brev. 516; *Cocke v. Halsey*, 16 Pet. 71; *Clark v. Commonwealth*, 29 Pa. St. 129; *Brown v. O'Connell*, 36 Conn. 432; *Blackburn v. The State*, 3 Head. 690; *Fowler v. Beebe*, 9 Mass. 231. In *Daviess County v. Dickinson*, 117 U. S. 657, it was held that bonds issued in excess of the statutory limits were invalid and void even in the hands of a *bond fide* purchaser for value, without notice and before maturity; and that an officer's certificate of a fact which he had no authority to determine was of no legal effect, and did not estop the municipality from showing that all the bonds which were issued after the statutory limit had been reached were void. See *Dixon County v. Field*, 111 U. S. 83.

¹ 118 Mass. 425.

² 10 Wall. 676, 684.

³ See *County of Daviess v. Dickinson*, 117 U. S. 657; *McCracken v. City of San Francisco*, 16 Cal. 591, 623; *Aspinwall v. Commissioners of Daviess County*, 22 How. 364; *Wadsworth v. Supervisors*, 102 U. S. 534. A town having no general power to issue negotiable bonds, but having power to issue bonds for certain specified municipal purposes, was sued on bonds which contained no statement of the purpose for which they were issued, and no recital which could bind the town by way of estoppel. The court held that the plaintiff was bound to allege and prove the authority of the town to issue them, and a demurrer to a declaration which con-

tained no such averment was sustained. *Hopper v. Corington*, 118 U. S. 148; *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 175; *Cragin v. Lovell*, 109 U. S. 194; *Kennard v. Cass County*, 3 Dill. 147; *Broome v. Taylor*, 76 N. Y. 564; *Cotton v. New Providence*, 18 Vroom, 401.

When a corporation has power under any circumstances to issue negotiable securities, the *bond fide* holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper. *Gelpeke v. Dubuque*, 1 Wall. 175, 203; *Supervisors v. Schenck*, 5 Wall. 772, 784; *Lexington v. Butler*, 14 Wall. 282, 296; *San Antonio v. Mehaffy*, 96 U. S. 312, 314; *Macon County v. Shores*, 97 U. S. 272, 279. But the circumstances referred to in those cases were the preliminary facts requisite to the exercise of the power, not the limits fixed by law of the objects and purposes for which the power could be exercised at all. In each of those cases the defects suggested were in the requisite preliminary proceedings, and the bonds sued on appeared by recitals on their face to have been issued according to law. When the law confers no authority to issue the bonds in question, the mere fact of their issue cannot bind the town to pay them even to a purchaser before maturity and for value. *Marsh v. Fulton County*, 10 Wall. 676; *East Oak-*

The Court of Errors of New Jersey decided¹ that purchasers of bonds issued under a statute limiting the amount, had the right to rely on the decision of the commissioners as conclusive in respect to the amount that could be put out under the statute. In *New Providence v. Halsey*,² the United States Supreme Court concurred in these decisions, and held that when the commissioners issued bonds, they averred that the issue was within the limit. Construing the act by the rule laid down in New Jersey, the legislative intent that their decision on the subject should be final, appears. The holder of the bonds had, therefore, the right to rely thereon, and bonds issued beyond the limit would be enforceable.³

Where State revenue bond scrip contained a provision that it would be received in payment of taxes, the court held that it was a contract with the holder for the time being, who has taxes to pay; and that although such a stipulation, faithfully executed, would give commercial value to the paper, in whosoever hands it might happen to be, it could not be said, as a matter of law, that the contract was broken until the scrip had been tendered for taxes due from a holder, and been refused; nor that the legal right of the holder was threatened unless he was in a situation to make a present tender for that purpose. He had no legal right to have the scrip received for taxes, unless he owed taxes for which it was receivable; and in order that it might be used for the payment of the taxes of another, he must transfer it to the new holder, and that would divest himself of all right to enforce a contract to which he was no longer a party, and in which he had ceased to have a legal interest.⁴

Where the liability of a municipal corporation upon negotiable

land *v. Skinner*, 94 U. S. 255; *Buchanan v. Litchfield*, 102 U. S. 278; *Dixon County v. Field*, 111 U. S. 83; *Hayes v. Holly Springs*, 114 U. S. 120; *Daviness County v. Dickinson*, 117 U. S. 657.

¹ *Cotton v. New Providence*, 18 Vroom (47 N. J. L.), 401, following the rule laid down in *Mutual Benefit Life Ins. Co. v. Elizabeth*, 13 Vroom (42 N. J. L.), 235.

² 117 U. S. 336.

³ See *Bernard's Township v. Stebbins*, 109 U. S. 341. The position was also taken in *New Providence v. Halsey*, 117 U. S. 336, that the holder of the bonds could not recover on them, inasmuch as he got them by assignment from citizens of New Jersey, who could not sue in the courts of the United States, and he was compelled to rely on the title of his assignors to avoid the matters placed in bar to the action. But the court held that a municipal bond, in the ordinary form, such as those sued on, is a promissory note, negotiable by

the law merchant, within the meaning of that term in the act of March 3, 1875, 18 Stat., 470, ch. 137, § 1, which allows a suit on instruments of that class to be brought in the courts of the United States by an assignee, notwithstanding a suit could not have been prosecuted in such court if no assignment had been made; and, therefore, that it was a matter of no importance that the holder made title to the bonds through assignments by the citizens of New Jersey. To the same effect is the holding in *Ackley School District v. Hall*, 113 U. S. 135.

⁴ *Hagood v. Southern*, 117 U. S. 52; *Marye v. Parsons*, 114 U. S. 325; *Williams v. Hagood*, 98 U. S. 72. See *Harshman v. Winterbottom*, 123 U. S. 215, on warrants issued in Missouri, receivable as payment for taxes. See *East St. Louis v. Zebley*, 110 U. S. 321; *Clay County v. McAleer*, 115 U. S. 616.

securities depends upon a local statute, the rights of the parties are to be determined according to the law as declared by the State courts at the time such securities were made. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in effect on contracts as an amendment of the law by means of a legislative enactment.¹ But when contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or where there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean to an agreement of views with the State courts if the question seems to be balanced with doubt.²

All persons taking securities of municipalities having no power to issue them, except as specially delegated by law for a particular purpose, must see to it that the conditions prescribed for the exercise of the power existed. As an essential preliminary to protection as a *bonâ fide* holder, authority to issue them must appear. If such authority did not exist, the doctrine of protection to a *bonâ fide* purchaser has no application. This is the rule even with commercial paper purporting to be issued under a delegated authority. The delegation must be first established before the doctrine can come in for consideration.³

There is a class of cases where recitals in obligations are held to supply such proof of compliance with the special authority delegated as to preclude the taking of any testimony on the subject, and estop the obligor from denying the fact. These have generally arisen upon municipal bonds, authorized by statute, upon the vote of the majority of the citizens of a particular city, county, or town, and in which certain persons or officers are designated to ascertain and certify as to the result. If, in such cases, the bonds refer to the statute, and recite a compliance with its provisions, and have passed for a valuable consideration into the hands of a

¹ *Green County v. Camess*, 109 U. S. 105; *Douglass v. County of Pike*, 101 U. S. 577; *County of Ralls v. Douglass*, 105 U. S. 723, 732; *Olcott v. Supervisors*, 16 Wall. 678; *City v. Lamson*, 9 Wall. 475, 485; *Boyd v. Alabama*, 94 U. S. 645; *Taylor v. Ypsilanti*, 105 U. S. 60, 71; *Thompson v. Lee County*, 3 Wall. 327, 330; *Brown v. Mayor*, 63 N. Y. 239, 244.

² *Burgess v. Seligman*, 107 U. S. 20, 33; *Anderson v. Santa Anna*, 116 U. S. 356.

³ *Merchants' Bank v. Bergen County*, 115 U. S. 384; *The Floyd Acceptances*, 7 Wall. 666, 676; *Marsh v. Fulton*, 10 Wall. 676; *Mayor v. Ray*, 19 Wall. 468.

bonâ fide purchaser, without notice of any defect in the proceedings, the municipality is held to be estopped from denying the truth of the recitals. The ground of the estoppel is that the officers issuing the bonds and inserting the recitals are agents of the municipality, empowered to determine whether the statute has been followed, and thus bind the municipality by their determination.¹

Even a *bonâ fide* holder of a municipal bond is bound to show legislative authority in the issuing body to create the bond. Recitals on the face of the bond or acts *in pais*, operating by way of estoppel, may cure irregularities in the execution of a statutory power, but they cannot create it. If legislative authority is wanting, the bonds have no validity. And where bonds have been issued without legislative authority, as a subscription to stock, if the legislature intend to legalize them, they must do so openly, intelligently, and in language not to be misunderstood; and as a doubtful or obscure declaration would not be justifiable, so it is not to be imputed.²

In an action brought by a State against the officers and stockholders of a railroad company, the bonds of which company were indorsed by the State, on demurrer to the declaration, it was held that as the liability of the defendants to the State was only statutory, there could be no recovery unless the facts stated in the declaration are such as to bring the defendants within the operation of the liability clauses in the statutes.³

Where bonds were held void as having been issued by a municipality in excess of authority,⁴ the court held that the holders of such bonds, and the agents of the city, being *particeps criminis* in the act of violating a constitutional prohibition, equity would no more raise a resulting trust in favor of the bondholders, than the law would, against public policy, raise an implied assumpsit against the municipality.⁵

By act of the legislature of Illinois, of Feb. 14, 1863, sect. 4, clause 3, the city council of Quincy was empowered to levy and collect, "to pay the debts and meet the general expenses of said city," not exceeding fifty cents on each \$100, per annum, on the assessed value of the real and personal property in the city. The

¹ Northern Bank of Toledo v. Porter Township Trustees, 110 U. S. 608; Dixon County v. Field, 111 U. S. 83.

² Hayes v. Holly Springs, 114 U. S. 120; State v. Stoll, 17 Wall. 425, 436.

³ Alabama v. Burr, 115 U. S. 413.

⁴ Buchanan v. Litchfield, 102 U. S. 278

⁵ Litchfield v. Ballou, 114 U. S. 190. See the Tennessee Bond Cases, 114 U. S.

663, as to the construction of the Tennessee act of February 11, 1852, as to whether a lien given to the State on a railroad system, to secure the payment of bonds issued by the State to the railroad company, ensured to the benefit of the bondholders. See, also, Hand v. Savannah & Charleston R. R. Co., 12 S. C. 314; Sinking Fund Cases, 99 U. S. 700, 725.

court held that this related to debts and expenses incurred for ordinary municipal purposes, and not to indebtedness arising from railroad subscriptions, the authority to make which was not implied from any general grant of municipal power, but was expressly conferred by statute.¹

The general grant of legislative power in the constitution of a State does not enable the legislature to authorize counties, cities, or towns, to contract, for private objects, debts which must be paid by taxes; nor can it authorize them to issue bonds to assist merchants or manufacturers, whether natural persons or corporations, in their private business.² Thus, bonds issued by Missouri to a private manufacturing company, formed and established for the purpose of carrying on and operating a rolling-mill for the manufacture of railroad iron, expressed to be issued in pursuance of an act of the legislature, were void upon their face; the act being unconstitutional.³

Municipal corporations are created to aid the State government in the regulation and administration of local affairs. They have only such powers of government as are expressly granted them, or such as are necessary to carry into effect those that are granted. No powers can be implied except such as are essential to the objects and purposes of the corporation as created and established. To the extent of their authority they can bind the people and the property subject to their regulation and governmental control, by what they do, but beyond their corporate powers their acts are of no effect. As power in a municipal corporation to borrow money and issue bonds therefor implies power to levy a tax for the payment of the obligation that is incurred, unless the contrary clearly appears,⁴ it follows that the power contained in a charter to borrow money does not authorize the issue of bonds unless they were issued for a corporate purpose, where there is a constitutional prohibition against taxation by the municipality, except for corporate purposes. It was, accordingly, held in *Ottawa v. Carey*,⁵ where the charter conferred all the powers usually granted to a city for the purposes of local government, authorizing the imposition of taxes for everything which, in the opinion of the city authorities,

¹ *Quincy v. Jackson*, 113 U. S. 332; *Quincy v. Cooke*, 107 U. S. 549; *Parkersburg v. Brown*, 106 U. S. 487, 501; *Ralls County v. United States*, 105 U. S. 733, 735; *United States v. County of Macon*, 99 U. S. 582; *United States v. New Orleans*, 98 U. S. 381, 393; *Loan Association v. Topeka*, 20 Wall. 655, 660.

² *Cole v. La Grange*, 113 U. S. 1; *Loan Association v. Topeka*, 20 Wall. 655; *Parkersburg v. Brown*, 106 U. S.

487; *Allen v. Jay*, 60 Me. 124; *Lowell v. Boston*, 111 Mass. 454; *Weismer v. Douglas*, 64 N. Y. 91; *In re Eureka Co.*, 96 N. Y. 42; *Bissell v. Kankakee*, 64 Ill. 249; *English v. People*, 96 Ill. 566; *Central Branch Union Pac. R. R. v. Smith*, 23 Kans. 745.

³ *Cole v. La Grange*, 113 U. S. 1.

⁴ *Rolls County Court v. The United States*, 105 U. S. 733.

⁵ 108 U. S. 110.

would promote the general prosperity and welfare of the municipality, the city was not invested with power to raise money by public taxation to be donated to private persons or corporations, as a bonus for developing the water power in the city or its vicinity, for manufacturing purposes, and that bonds for such purpose in the hands of purchasers thereof with notice of the object for which they were issued, were void.¹

Mere recitals by the officers of a municipal corporation in bonds issued in aid of a railroad corporation do not preclude an inquiry, even where the rights of a *bonâ fide* holder are involved, as to the existence of legislative authority to issue the bonds. In *Northern Bank v. Porter Township*,² it was held that, as was held in *Anthony v. Jasper County*,³ purchasers of municipal bonds are charged with notice of the laws of the State, granting power to make the bonds they find on the market. If the power exists in the municipality, the *bonâ fide* holder is protected against mere irregularities in the manner of its execution, but if there is a want of power, no legal liability can be created. So that, while the township is estopped by the recitals in the bonds from saying that no township election was held, or that it was not called and

¹ The cases of *Haskett v. Ottawa*, 99 U. S. 86, and *Ottawa v. National Bank*, 105 U. S. 342, were decided, as was pointed out in *Ottawa v. Carey*, 108 U. S. 110, 118, upon the ground that the bonds in suit appeared on their face to have been issued for municipal purposes, and were therefore valid in the hands of *bonâ fide* holders. In *Livingston v. Darlington*, 101 U. S. 407, the town subscription was towards the establishment of a State reform school, which was undoubtedly a public purpose, and the question in controversy was whether it was a corporate purpose, within the meaning of the constitution of Illinois. In *Burlington v. Beasley*, 94 U. S. 310, the grist mill held to be a work of internal improvement, to aid in constructing which a town might issue bonds under the statutes of Kansas, was a public mill which ground for toll for all customers. See *Osborne v. Adams County*, 106 U. S. 181, and 109 U. S. 1; *Blair v. Cuming County*, 111 U. S. 363. Subscriptions and bonds of towns and cities, under legislative authority, to aid in establishing railroads, have been sustained on the same ground on which the delegation to railroad corporations of the sovereign right of eminent domain has been justified, — the accommodation of public travel. *Rogers v. Burlington*, 3 Wall. 654; *Queensbury v. Culver*, 19 Wall. 83; *Loan Association v. Topeka*, 20 Wall. 661, 662; *Taylor v. Ypsilanti*, 105 U. S. 60. Statutes

authorizing towns and cities to pay bounties to soldiers have been upheld, because the raising of soldiers is a public duty. *Middleton v. Mullica*, 112 U. S. 433; *Taylor v. Thompson*, 42 Ill. 9; *Hilbush v. Catherman*, 64 Pa. 154; *State v. Richland*, 20 Ohio St. 362; *Agawam v. Hampden*, 130 Mass. 528, 534; *Montclair v. Ramsdell*, 107 U. S. 154. In *United States v. Dodge County*, 110 U. S. 156, it was held that a bridge across a river is a work of internal improvement within the scope and terms of the Nebraska act of 1869 (see *County Commissioners v. Chandler*, 96 U. S. 205; *Fremont Building Association v. Sherwin*, 6 Neb. 48), and a mandamus was granted for payment of bonds for that purpose. In *Blair v. Cuming County*, 111 U. S. 363, it was held that improving the water-power of a river, by constructing a canal for water-power purposes to propel public grist mills, was a "work of internal improvement of a public nature," within the meaning of the Nebraska act, Genl. Stat. of 1873, ch. 13, §§ 7, 14 (see *Union Pacific R. R. v. Commissioners*, 4 Neb. 450; *The State v. Thorne*, 9 Neb. 458; *Dawson County v. McNamar*, 10 Neb. 276; *Traver v. Merriek County*, 14 Neb. 327), and municipal bonds issued for such purpose were valid.

² 110 U. S. 608.

³ 101 U. S. 693, 697.

conducted in the particular mode required by law; it is not estopped to show that it was without authority of the legislature to order the election or issue the bonds. The question of legislative authority in a municipal corporation to issue bonds in aid of a railroad company cannot be concluded by mere recitals; but, the power existing, the municipality may be estopped by recitals to prove irregularities in the exercise of the power; or, when the law prescribes conditions upon the exercise of the power granted, and commits to the officers of such municipality the determination of the question whether those conditions have been performed, the corporations will also be estopped by recitals which import such performance.¹

The transfer of coupons which is a mere contrivance, a pretence, the result of a collusive arrangement to create in favor of the plaintiff a fictitious ground of federal jurisdiction, so as to get a re-examination in that jurisdiction of the question decided adversely to the owners of the coupons by the highest judicial tribunal of the State, will not enable the plaintiff to maintain an action in the federal courts upon such coupons, the bonds or instruments to which they were attached not having been assigned to him, but having been issued to and having always been held by the assignor of the coupons.²

Municipal bonds in the customary form, payable to bearer, are commercial securities, possessing the same qualities and incidents that belong to what are strictly promissory notes negotiable by the law merchant; and when issued under the authority of law, and made payable to a named person, or order, have like qualities and incidents. And a provision, such as that in the statute of Iowa, of April 6, 1868, that bonds issued under the authority of the act shall be "payable at the pleasure of the district at any time before due," does not affect the complete negotiability of the bonds, for, by their terms, they are payable at a time which must certainly arrive; the holder could not exact payment before the

¹ *Northern Bank v. Porter Township*, 110 U. S. at p. 618. See *Dallas County v. McKenzie*, 101 U. S. 686; *Brooklyn Insurance Co. v. Insurance Co.*, 99 U. S. 362. See *County of Macon v. Shores*, 97 U. S. 272, as to amendment in the constitution of a county not affecting acts previously authorized. Where what was done by the constitutional majority of the qualified electors, and by the board of supervisors of the county, would have been legal and binding upon the county had it been done under legislative authority previously conferred, subsequent ratification by the legislature, in the absence of constitutional restrictions upon such legislation, is equi-

valent to original authority. *Grenada County Supervisors v. Brogden*, 112 U. S. 261; *Cutler v. Board of Supervisors*, 56 Miss. 115; *Supervisors v. Schenck*, 5 Wall. 772; *Ritchie v. Franklin*, 22 Wall. 167; *Thompson v. Lee County*, 3 Wall. 327; *City v. Lamson*, 9 Wall. 477, 485; *St. Joseph v. Rogers*, 16 Wall. 644, 663; *Campbell v. City of Kenosha*, 5 Wall. 194.

² *Farmington v. Pillsbury*, 114 U. S. 138; *Hawes v. Oakland*, 104 U. S. 450, 459; *Hayden v. Manning*, 106 U. S. 586; *Detroit v. Dean*, *Id.* 537, 541; *Bernard's Township v. Stebbins*, 109 U. S. 341.

day fixed in the bonds, and the debtor incurred no legal liability for non-payment until that day passed.¹

Prior to the adoption of the Illinois constitution of 1870, an incorporated city, its corporate authorities being thereunto authorized by the legislature, could make a subscription to the capital stock of a railroad company, without referring the question of subscription to a popular vote.² The United States Supreme Court, therefore, held, that it was competent for the legislature of that State in 1869, to make an election of 1868 legal and binding as an expression of the popular will, and, upon the basis of the election thus legalized, empower or authorize the corporate authorities of the municipality to issue the bonds for the amount indicated by the popular vote.³

By the charter of the city of East St. Louis it was provided that the city council should levy and collect a tax not exceeding three mills on the dollar upon each annual assessment made for general purposes for the purpose of meeting the liability on the city bonds; the city being limited to an assessment of one per cent per annum for all purposes. The United States Supreme Court held that while a mandamus would lie requiring the full levy of one per cent and the devotion of three-tenths thereof to the payment of the bonded debt, the court had no power to make a similar order with reference to the remaining seven-tenths required for general purposes; that while the surplus thereof at the end of the year might be subject to the order of the court, the question what expenditures were proper and necessary for the municipal administration, was not judicial, but was confided by law to the discretion of the municipal authorities, and no court had the right to control that discretion, much less to usurp and supersede it.⁴

Recitals in municipal bonds, containing no statement of any election called or held, or of the vote by which the issue of the bonds was authorized, and not even embodying a general statement that the bonds were issued in pursuance of the statutes to which they refer, nor saying anything whatever as to any compliance with the requirements of the statute in respect to which the municipal officers were authorized to determine and certify, but at the utmost making a statement that the subscription for which the bonds were in part given was authorized by the statutes mentioned, serve simply to point out the particular laws

¹ *Ackley School District v. Hall*, 113 U. S. 135. See *New Providence v. Halsey*, 117 U. S. 336, also, as to negotiability of municipal bonds.

² *Keithsburg v. Frick*, 34 Ill. 405, 421; *Quincy, Mo. & Pac. R. R. Co. v. Morris*, 84 Ill. 410; *Marshall v. Silliman*, 61 Ill.

218, 225; *Quincy v. Cook*, 107 U. S. 549.

³ *Jonesboro City v. Cairo & St. Louis R. R. Co.*, 110 U. S. 192.

⁴ *East St. Louis v. Zebbley*, 110 U. S. 321.

under which the transaction may lawfully have taken place, but they do not, even as to *bonâ fide* holders, without notice, constitute an estoppel which prevents inquiry into the alleged invalidity of the bonds.¹

Mere political bodies, constituted as counties are, for the purpose of local police and administration, and having the power of levying taxes to defray all public charges created, whether they are or are not formally invested with corporate capacity, have no power or authority to make and utter commercial paper of any kind, unless such power is expressly conferred upon them by law, or clearly implied from some other power expressly given, which cannot be fairly exercised without it.²

The legislature of a State, unless restrained by its organic law, has the right to authorize a municipal corporation to issue bonds in aid of a railroad, and to levy a tax to pay the bonds and the interest on them, with or without a popular vote, and to cure by a retrospective act irregularities in the exercise of the power conferred.³

Bonds purporting to have been issued by a municipality, but which were neither signed nor registered, in accordance with the statute under which their issue was authorized, were decided to be invalid.⁴

There must be authority by statute for every issue of bonds by a municipality, as a donation to any railroad or other work of internal improvement. Where bonds have been issued without warrant of law, as all parties are equally bound to know the law, a certificate verified by the signature of the municipal officers and the seal of the municipality, reciting the actual facts, and that thereby the bonds are conformable to the law, when, judicially speaking, they are not, will not make them so, nor can it work an estoppel upon the county to claim the protection of the law; otherwise it would always be in the power of a municipal body, to which power was denied, to usurp the forbidden authority by declaring that its assumption was within the law. This would suppose such corporate bodies to be superior to the law itself.

¹ Carroll County v. Smith, 111 U. S. 556; Northern Bank of Toledo v. Porter Township, 110 U. S. 608; Dixon County v. Field, 111 U. S. 83; School District v. Stone, 106 U. S. 183.

² Claiborne County v. Brooks, 111 U. S. 406, 406; Police Jury v. Britton, 15 Wall. 566.

³ Otoe County v. Baldwin, 111 U. S. 1; Thompson v. Lee County, 3 Wall. 327; Campbell v. City of Kenosha, 5 Wall. 194. See Union Trust Co. v. Illinois Midland Co., 117 U. S. 434, where necessary expenses, incurred subsequently to the issue of bonds secured by a mortgage by a rail-

road company, were allowed priority over the bonds. See also Wallace v. Loomis, 97 U. S. 146; Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 311, 312; Union Trust Co. v. Souther, 107 U. S. 591; Burnham v. Bowen, 111 U. S. 776; Fossdick v. Schall, 99 U. S. 235, 253, 254; Meyer v. Johnston, 53 Ala. 237; Hoover v. Montclair, &c. Ry. Co., 2 Stew. (29 N. J. Eq.) 4.

⁴ Bissel v. Spring Valley Township, 110 U. S. 162; Anthony v. County of Jasper, 101 U. S. 693, 697; McGarrahan v. Mining Co., 96 U. S. 316.

In *Dixon County v. Field*,¹ the effect of recitals in municipal bonds is considered at length, and while the principle is conceded as laid down in *Town of Coloma v. Eaves*,² that where it may be gathered from the legislative enactment that the officers of the municipality were invested with the power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them, and held by a *bonâ fide* purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal. Yet the converse of this is embraced in the proposition, and is equally true. If the officers authorized to issue bonds, upon a condition, are not the appointed tribunal to decide the fact, which constitutes the condition, their recital will not be accepted as a substitute for proof. In other words, where the validity of the bonds depends upon an estoppel, claimed to arise upon the recitals of the instrument, the question being as to the existence of power to issue them, it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals and to make them conclusive. The very ground of the estoppel is that the recitals are the official statements of those to whom the law refers the public for authentic and final information on the subject. This is the rule which has been constantly applied in the numerous cases in which it has been involved. The difference in the result of the judgments has depended upon the question whether, in the particular case under consideration, a fair construction of the law authorized the officers issuing the bond to ascertain, determine, and certify the existence of the facts upon which their power, by the terms of the law, was made to depend; not including that class of cases in which the controversy related, not to conditions precedent, on which the right to act at all depended, but upon conditions affecting only the mode of exercising a power admitted to have come into being.³

On the principle that when the seal of a party, required to make an instrument valid and effectual at law, has been omitted by accident or mistake, a court of chancery, in order to carry out his intention, will, at the suit of those who are justly and equitably entitled to the benefit of the instrument, adjudge it to be as valid as if it had been sealed, and will grant relief accordingly, either by compelling the seal to be affixed, or by restraining the setting

¹ 111 U. S. 83.

² 92 U. S. 484.

³ *Marey v. Township of Oswego*, 92 U. S. 637; *Commissioners of Douglas County v. Bolles*, 94 U. S. 104; *Commissioners of Marion County v. Clark*, 94 U. S. 278; *County of Warren v. Marey*,

97 U. S. 96; *Pana v. Bowler*, 107 U. S. 529; *Sherman County v. Simons*, 109 U. S. 735; *Buchanan v. Litchfield*, 102 U. S. 278; *National Bank v. Porter Township*, 110 U. S. 608; *Anderson County Commissioners v. Beal*, 113 U. S. 227.

up the want of it to defeat a recovery at law,¹ the United States Supreme Court held, where one had purchased for value, in good faith, municipal bonds, on which the seals had been omitted by oversight and mistake, and without observing the omission, that a court of equity would, at his suit, decree that the bonds he held as valid as if actually sealed before being issued, and would restrain the setting up of the want of seals in the action at law.²

Unless power has been given by the legislature to a municipal corporation to grant pecuniary aid to railroad corporations, all bonds of the municipality issued for such a purpose, and bearing evidence of the purpose on their face, are void even in the hands of *bonâ fide* holders, and this whether the people voted the aid or not. Every purchaser of such a bond is chargeable in law with notice of the want of power in the municipal authorities to bind the body politic in that way. It is a matter of no importance that the municipality employed agents to sell the bonds, or that its law officer gave an opinion in favor of their validity, or that they were recognized in official statements as binding obligations, or that taxes had been levied to pay either principal or interest. Corporate ratification, without authority from the legislature, cannot make a municipal bond valid which was void when issued for want of legislative power to make it.³

Where it becomes necessary, in a suit on bonds, where fraud or illegality in their inception has been established, for the holder to show that the bonds were purchased for value, it is not absolutely necessary that he should show that he purchased for value, for, if any previous holder of the bonds in suit was a *bonâ fide* holder for value, the plaintiff, without showing that he had himself paid value, could avail himself of the position of such previous holder.⁴

¹ *Smith v. Aston*, Freem. Ch. 308; s. c. Cas. Temp. Finch, 273; *Cockerell v. Cholmeley*, 1 Russ. & Myl. 418, 424; *Wadsworth v. Wendell*, 5 Johns. Ch. 224; *Montville v. Houghton*, 7 Conn. 543; *Rutland v. Paige*, 24 Vt. 181; *Wiser v. Blachly*, 1 Johns. Ch. 607; *Green v. Morris & Essex R. R. Co.*, 1 Beas. 165; 2 McCart., 469; *Druiff v. Parker*, L. R. 5 Eq. 131; *Draper v. Springport*, 104 U. S. 501; *Harris v. Pepperell*, L. R. 5 Eq. 1; *Elliott v. Sackett*, 108 U. S. 132.

² *Bernard's Township v. Stebbins*, 109 U. S. 341. *Knox County Court v. United States*, 109 U. S. 229, follows other cases named on municipal liability for bonds. See *Howard County v. Paddock*, 110 U. S. 334; *County of Callaway v. Foster*, 93 U. S. 567, as to effect of subsequent legislation on charters of railway companies, and on municipal bonds as subscriptions therefor.

³ *Lewis v. City of Shreveport*, 108 U. S. 282; *Wilson v. Shreveport*, 29 La. An. 673. In *Quincy v. Cook*, 107 U. S. 549, it was held that the act of the State legislature legalizing an ordinance for the issuing of bonds, which ordinance had been passed without legal authority, rendered bonds issued subsequently to the passage of the act valid. And see *Read v. Platts-mouth*, 107 U. S. 568. An act empowering a city to issue bonds for purposes of internal improvements was held to authorize the guaranty of a city to the bonds of a railroad company. *City of Savannah v. Kelly*, 108 U. S. 184. And see *Green County v. Conness*, 109 U. S. 104. On estoppel by recitals, see *Sherman County v. Simons*, 109 U. S. 735; *Grenada County Supervisors v. Brogden*, 112 U. S. 261.

⁴ *Montclair v. Ramsdell*, 107 U. S. 147; *Hunter v. Wilson*, 19 L. J. N. S. (Ex.) 8; *Commissioners v. Bolles*, 94 U. S.

A statute authorized a township to subscribe to the capital stock of any railroad company within the State, "building or proposing to build a railroad into, through, or near such township." Bonds were issued as a subscription to stock of a railroad company proposing to build a railroad within nine miles of the township. The court held, reversing the decision of the court below, that the nearness of the railroad to benefit the township, was, within reasonable limits, a question which the people of the township and the County Court of the county were qualified and authorized to settle for themselves; and where their action in favor of such subscription was supplemented by payment of interest for three years, the court should acquiesce in the determination of the qualified voters and the local authorities that the road in question was "near" to the township, and the bonds, as between the township and a *bonâ fide* holder for value, were sustained.¹

Bonds issued under the law of the State, which recite that the company to which they were delivered, by a municipality, had fully performed the conditions upon which the municipality had promised to issue the bonds; and which, after their issue, and before the maturity of the first coupons thereto attached, were sold, transferred, and delivered to a *bonâ fide* purchaser, for full value, with no knowledge with reference to the manner in which the bonds have been issued, except what he derives from the recitals in the bonds, are not affected by an act of the legislature passed several months after the performance by the company of all the conditions on which the bonds were issuable by the municipality. Such legislation would be unconstitutional and void.²

104. This question was directly adjudged in *Commissioners v. Bolles*, 94 U. S. 104. One of the issues there was whether the plaintiffs were *bonâ fide* holders of certain municipal bonds. After stating that the legal presumption was that they were, the court said: "But the plaintiffs are not forced to rest upon mere presumption to support their claim to be considered as having the rights of purchasers without notice of any defence. They can call to their aid the fact that their predecessors in ownership were such purchasers. To the rights of the predecessors they have succeeded. Certainly the railroad company paid for the bonds and coupons by paying an equal amount of their stock, which the county now holds; and nothing in the special facts found shows that the company knew of any irregularity or fraud in their issue. And, still more, the contractor for building the road received the bonds from the county in payment for his work, either in whole or in part, after his

work had been completed. There is no pretence that he had notice of anything that should have made him doubt their validity. Why was he not a *bonâ fide* purchaser for value? The law is undoubted, that every person succeeding him in the ownership of the bonds is entitled to stand upon his rights."

¹ *Kirkbride v. Lafayette County*, 108 U. S. 208. See *Van Hostrup v. Madison*, 1 Wall. 291; *Meyer v. Muscatine*, *Id.* 384; *Howard County v. Booneville Central Nat. Bank*, 108 U. S. 314.

² *Red Rock v. Henry*, 106 U. S. 596.

If possible, the act of the legislature will be construed so as to relieve the State from the imputation of bad faith. *Broughton v. Pensacola*, 93 U. S. 266. And will not, if it can be avoided, be held repugnant to the act under which the issue of the bonds was authorized, and an implication of repeal of the prior act will not, in such case, readily be allowed. *McCool v. Smith*, 1 Black, 459; *United*

A municipality is not estopped by the payment of interest by its officials, from denying the validity of its bonds which have been illegally issued, but the municipality is liable to account to the *bond fide* holders of such bonds for the proceeds received from the original purchasers, less such payments as have been made on the bonds.¹

County bonds issued in Missouri by a *de facto* County Court, sealed with the seal of the court, and signed by the *de facto* president, cannot be impeached in the hands of an innocent holder by showing that the acting president was not *de jure* one of the justices of the court.²

States *v.* Tynen, 11 Wall. 83; Wood *v.* United States, 16 Pet. 342; Henderson's Tobacco, 11 Wall. 652; King *v.* Cornell, 106 U. S. 395; Murdock *v.* City of Memphis, 20 Wall. 590.

Recitals are estoppels only as to facts which such recitals fairly import. Where the holder relies for protection upon mere recitals, they should, at least, be clear and unambiguous, in order to estop a municipal corporation in whose name such bonds have been made, from showing that they were issued in violation, or without authority, of law. School District *v.* Stone, 106 U. S. 183.

¹ Parkersburg *v.* Brown, 106 U. S. 487. Where there has been a total want of power to issue the bonds originally, under any circumstances, and not a mere failure to comply with prescribed requirements or conditions, the case is not one for applying to the municipality, under any state of facts, any doctrine of estoppel or ratification, by reason of its having paid some instalments of interest on the bonds (Loan Association *v.* Topeka, 20 Wall. 655), or by reason of any of the acts of its officers or agents in dealing with the property covered by the deed of trust. No such acts can give validity to the statute or to the bonds, however they may affect the *status* of the property dealt with or the relation of the municipality to such property. Parkersburg *v.* Brown, 106 U. S. 487, 501. Where the illegality of the contract does not arise from any moral turpitude, and where property is transferred to a municipality under a contract which is merely *malum prohibitum*, and where the municipality is the principal offender, the municipality may be made to refund to the person from whom it has received property for the unauthorized purpose, the value of that which it has actually received. White *v.* Franklin Bank, 22 Pick. 181; Morrille *v.* American Tract Soc., 123 Mass. 129; Davis *v.* Old Colony Railroad, 131 Mass. 258, 275; *In re* Cork & Youghal Railway, L. R. 4 Ch.

748. But when the corporation has actually received nothing in money or property, it cannot be held liable upon an agreement to share in, or to guarantee the profits of, an enterprise which is wholly without the scope of its corporate powers, upon the mere ground that conjectural or speculative benefits were believed by its officers to be likely to result from the making of the agreement, and that the other party has incurred expense upon the faith of it. East Anglian Railways *v.* Eastern Counties Railway, 11 C. B. 775; Macgregor *v.* Dover & Deal Railway, 18 Q. B. 618; Ashbury Ry. Co. *v.* Riche, L. R. 7 H. L. 653; Thomas *v.* Railroad Co., 101 U. S. 71; Downing *v.* Mt. Washington Road Co., 40 N. H. 230; Franklin Co. *v.* Lewiston Ins. for Savings, 68 Me. 43.

² County of Ralls *v.* Douglass, 105 U. S. 729; State *v.* Douglass, 50 Mo. 593, 596; Harbaugh *v.* Winsor, 38 *Ib.* 327. The distinction between an officer *de facto* and an officer *de jure* is well established, and is of ancient origin. It is said in the case of Parker *v.* Kett, 1 Ld. Raym. 660, that an officer *de facto* is one who has the reputation of being an officer, and yet is not a good officer in point of law; and this definition is quoted and approved by Lord Ellenborough, in Rex *v.* Corporation of Bedford, 6 East, 368. A person may be disqualified and ineligible to hold an office, yet, as a *de facto* officer, his acts, until his removal, will be valid as to third persons. St. Louis County Court *v.* Sparks, 10 Mo. 117; Knight *v.* Corporation of Wells, 1 Lutw. 509, 519. And where an appointment is regularly made, it is a colorable authority for the appointee, and renders him, while exercising the functions of the office, an officer *de facto*, and his acts valid, so far as third persons are concerned, even though he has not pursued the necessary formalities to make him an officer *de jure*. The People *v.* Cook, 4 Sedl. 67, 89. It is said in this case: "An officer *de facto* is one

It is no defence to bonds issued by counties in Missouri, in payment of subscriptions to the capital stock of a company, and in the hands of innocent holders, that the company to whose stock the subscription was made was not organized within the time limited by its charter.¹

When authority is granted by the legislative branch of the government to a municipality, or a sub-division of a State, to contract an extraordinary debt by the issue of negotiable securities, the power to levy taxes sufficient to meet, at maturity, the obligation to be incurred, is conclusively implied, unless the law which confers the authority, or some general law in force at the time, clearly manifests a contrary legislative intention. The power to tax is necessarily an ingredient of such a power to contract, as ordinarily political bodies can only meet their pecuniary obligations through the instrumentality of taxation.²

The prohibition in the constitution of Missouri, of 1865, art. 11, sec. 14, prohibiting a county from becoming a stockholder in or loaning its credit to a corporation, without a vote of the people,

who comes into office by color of a legal appointment or election. His acts in that capacity are as valid, as far as the public is concerned, as the acts of an officer *de jure*. His title cannot be inquired into collaterally." The doctrine on the subject will be found in the following cases: *The People v. Hopson*, 1 Denio, 579; *Cocke v. Halsey*, 16 Pet. 71; *People v. Stevens*, 5 Hill, 616; *McKinstry v. Tanner*, 9 Johns. 549; *Wilcox v. Smith*, 5 Wend. 231; *Berryman v. Wise*, 4 T. R. 366; *Bevan v. Williams*, 3 T. R. 635, n.; *Radford v. McIntosh*, 3 T. R. 632; *Crosse v. Kay*, 6 T. R. 663; 17 Vin. Ab. 114; *The People v. Bartlett*, 6 Wend. 422; *Weeks v. Ellis*, 2 Barb. 324. The doctrine that the acts of an officer *de facto* are valid extends only to prevent mischief to such as confide in officers who are acting without right. The office is void as to the officer himself, though valid as to strangers. *The People v. Collins*, 7 Johns. 549; *Fowler v. Bebee*, 9 Mass. 231; *Commonwealth v. Fowler*, 10 Mass. 290; *Buckman v. Ruggles*, 15 Mass. 180; *Riddle v. The County of Bedford*, 7 S. & R. 386, 392; *Parker v. Luffborough*, 11 S. & R. 249; *Keyser v. McKissan*, 2 Rawle, 139; *Cro. Eliz.* 699; *King v. Lysle*, *Andrews*, 163; *Hippisly v. Tucke*, 2 Lev. 184. In *Cro. Eliz.*, 699, the reason is given for the rule: "That the act of an officer *de facto*, where it is for his own benefit, is void; because he shall not take advantage of his own want of title, which he must be conscious of; but where it is for the benefit of strangers or the public, who

are presumed to be ignorant of such defects of title, it is good." In *Harbaugh v. Winsor*, 38 Mo. 331, the court say: "The rule imparting validity to the acts of a *de facto* officer is indispensably necessary to prevent the failure of justice. The business of the community could not be transacted without it. Irreparable wrong would result from any other doctrine. The public are necessarily compelled to do business with an officer who is exercising the duties and privileges of an officer under color of right, and to say that his acts as to strangers should be void, would be gross injustice. It would cause a suspension of business till every officer's right *de jure* was established. This would not only produce inconvenience, but it would be a sheer absurdity. The law will therefore not permit official acts to be impeached collaterally. This view of the law is well settled, and we are not aware of any authority to the contrary."

¹ *County of Ralls v. Douglass*, 105 U. S. 728; *Hall Bank v. Merchants' Bank*, 10 Mo. 123; *Kayser v. Trustees of Bremen*, 16 Mo. 88; *Smith v. County of Clark*, 54 Mo. 58; *City of St. Louis v. Shields*, 62 Mo. 247; *County of Macon v. Shores*, 97 U. S. 272.

² *Ralls County Court v. United States*, 105 U. S. 733; *Loan Association v. Topeka*, 20 Wall. 645; *United States v. New Orleans*, 98 U. S. 381; *United States v. County of Macon*, 99 U. S. 582; *State v. Dallas County Court*, 72 Mo. 329.

was intended as a limitation on future legislation only, and was not intended to retroact so as to have any controlling application to laws in existence when the constitution was adopted.¹

Bonds were issued by a municipality in New York and given to a railroad company, which, as between the municipality and the company, were decided to be illegal. Whether good as between holders and the municipality depended upon whether the holders were *bonâ fide* holders for value, without notice, and the municipality was held not to be estopped by the fact that the same holder had previously obtained judgment on similar bonds, as *non constat* but he may have obtained those now sued on after the illegality of the bonds had been decided, and under circumstances which would show that he was not a *bonâ fide* holder without notice.²

Although the records of the municipality contained no evidence of a township meeting at which the qualified voters assented to the issue of bonds, yet the court held that as the statutes conferred ample authority upon the township to issue bonds in payment of the donation voted, the qualified electors assenting thereto

¹ County of Ralls v. Douglass, 105 U. S. 728. The Supreme Court of Missouri has many times decided in this way, and the United States Supreme Court, following such decisions, has always held the same doctrine. State v. Macon County Court, 41 Mo. 453; Kansas City, &c. R. R. Co. v. Alderman, 47 Mo. 349. In State v. County Court of Sullivan County, 51 Mo. 522, it was said: "It has always been held that the provision of the Constitution, art. 11, § 14, was a limitation upon the future power of the legislature, and was not intended to retroact so as to have any controlling application to laws in existence when the Constitution was adopted." State v. Greene County, 54 Mo. 540; County of Callaway v. Foster, 93 U. S. 567; County of Scotland v. Thomas, 94 U. S. 682; County of Henry v. Nicolay, 95 U. S. 619; County of Cass v. Gillett, 100 U. S. 585. When all these cases were decided the act of March 23, 1861, was in force, which provided that it should not be lawful for counties to subscribe to the stock of railroad companies until an election had been held under the provisions of that act, yet it seems never to have been specially referred to, either by counsel or the court, except once in Smith v. Clarke County, 54 Mo. 58, 70, when Napton, J., said: "So that the provisions of the revised Code of 1855, and the amendatory acts of 1860 and 1861, and the constitutional prohibition, and the legislative adoption of that prohibition immediately after its passage,

have been held by repeated adjudications, and without any conflicting opinions of the court, or any individual judge thereof, so far as their reports show, not to effect the repeal of the privileges contained in special charters." By later decisions in Missouri, in State v. Garrouette, 67 Mo. 445, and State v. Dallas County, 72 Mo. 329, this whole line of cases was substantially overruled. In County of Ralls v. Douglass, 105 U. S. 728, 731, the Supreme Court of the United States refused to follow these later decisions on the ground that the bonds involved in the suit were all in the hands of innocent holders when the law of the State was so materially altered by its courts; and that the rights of the parties to the suit were to be determined by the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper. Douglass v. Pike County, 101 U. S. 687.

² Stewart v. Lansing, 104 U. S. 505. And see Cromwell v. County of Sac, 94 U. S. 351. It is an elementary rule that if fraud or illegality in the inception of negotiable paper is shown, an indorsee before he can recover must prove that he is a holder for value. The mere possession of the paper under such circumstances is not enough. Smith v. Sac County, 11 Wall. 139; Hall v. Featherstone, 3 H. & N. 284; Bailey v. Bidwell, 13 M. & W. 73; Fitch v. Jones, 5 E. & B. 238; Berry v. Alderman, 14 C. B. 95; Edmunds v. Groves, 2 M. & W. 642; Smith v. Braine, 16 Q. B. 244.

at a regular or special town meeting, and as the bonds recited that they were issued in pursuance of the authority conferred by those statutes, the validity of the bonds, in the hands of a *bonâ fide* purchaser, did not depend upon proof that such an election was in fact duly called and held, at which the qualified voters assented to an issue of bonds in payment of the donation previously voted. The recital imported a compliance with the statute, and the township was estopped from asserting, as against a *bonâ fide* holder for value, that such recitals were untrue.¹

A municipality having power to issue its bonds, under which it issues them and puts them into circulation as commercial securities, the bonds, particularly if they are negotiable, are *primâ facie* obligations of the obligors, if they had power to issue them, and are binding according to the terms and conditions apparent on their face until the contrary be shown. All the holder of them has to do, in case of non-payment, is simply to sue on the bonds. If there is any defence to them by reason of want of performance of any of the requisites necessary to give them validity, or for any other cause, it is necessary for the obligor to show it. Whether an alleged defence, when set up, is or is not good against the particular holder, is to be determined by the court in each case.²

The capital stock of a corporation, especially its unpaid subscriptions, constitutes a trust fund for the benefit of its general creditors, and its governing officers cannot, by agreement or other transaction with the stockholder, release him from his obligation to pay, to the prejudice of its creditors, except by fair and honest dealing and for a valuable consideration.³

¹ Bonham v. Needles, 103 U. S. 648. See Harter v. Kenrochan, *Ib.* 562; Buchanan v. Litchfield, 102 U. S. 278. In Kenicott v. Supervisors, 16 Wall. 452, the rule was thus stated: "If an election or other fact is required to authorize the issue of the bonds of a municipal corporation, and if the result of that election or the existence of that fact is by law to be ascertained and declared by any judge, officer, or tribunal, and that judge, officer, or tribunal on behalf of the corporation, executes or issues the bonds, with a recital that the election has been held or that the fact exists or has taken place, this will be sufficient evidence of the fact to all *bonâ fide* holders." County of Moultrie v. Savings Bank, 92 U. S. 631; Marcy v. Township of Oswego, *Ib.* 637; Commissioners of Knox County v. Aspinwall, 21 How. 539; Orleans v. Pratt, 99 U. S. 676; Town of Coloma v. Eaves, 92 U. S. 484; Humboldt Township v. Long, *Ib.* 642.

² Lincoln v. Iron Company, 103 U. S. 412.

³ County of Morgan v. Allen, 103 U. S. 498. See Sawyer v. Hoag, 17 Wall. 610. In Sawyer v. Upton, 91 U. S. 56, the United States Supreme Court said: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied otherwise than upon their demands until such demands are satisfied. The creditors have a lien upon it in equity. If diverted they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bonâ fide* for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation for their security. Unpaid stock

By the constitution of Tennessee of 1834, the legislature was prohibited from granting special immunities to individuals, but it had "power to grant such charters of incorporation as may be deemed expedient for the public good." In *County of Tipton v. Locomotive Works*,¹ it was held that certain acts passed by the legislature were not repugnant to the constitution by reason of their having conferred authority on a limited number of counties, to make, and on a particular corporation to receive, a subscription of stock, nor because they dispensed with the previous assent of the people of such counties expressed at a popular election.²

A congressional township, being, under the constitution of Illinois,³ a body incorporated for school purposes only, comes within the limitation of the constitution on the power of the legislature to authorize taxation by public corporations or the political subdivisions of the State.⁴ Taxation, therefore, on persons and property within the jurisdiction of such township, to build railroads, is not taxation for a corporate purpose, and their bonds issued for such a purpose are invalid.⁵

Until the legislature authorizes an election, a vote of the people

is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due the company. As regards creditors, there is no distinction between such a demand and any other assets which may form a part of the property and effects of the corporation." The same doctrines are held in *Upton v. Tribilecock*, 91 U. S. 45; *Webster v. Upton*, *Id.* 65; *Hatch v. Dana*, 101 U. S. 205; *Morgan County v. Thomas*, 76 Ill. 120; *Thomas v. The County of Morgan*, 39 Ill. 496; 59 Ill. 479; *Henry v. The Vermilion, &c. Ry. Co.*, 17 Ohio, 187; *Miers v. Z. & M. T. Co.*, 11 Ohio, 273; *Morris v. Cheney*, 51 Ill. 451.

¹ 103 U. S. 523.

² See *School District v. Insurance Co.*, 103 U. S. 707; *County of Wilson v. National Bank*, *Id.* 770. And see the following Tennessee cases. *Budd v. The State*, 3 Humph. 483; *Vanzant v. Waddel*, 2 Yerg. 269; *State Bank v. Cooper*, *Id.* 599; *Tate v. Bell*, 4 Yerg. 202; *Officer v. Young*, 5 Yerg. 320; *Fisher v. Dabbs*, 6 Yerg. 119; *Jones v. Perry*, 10 Yerg. 59, 78; *Marr v. Enboe*, 1 Yerg. 452; *Sheppard v. Johnson*, 2 Humph. 235; *Hazen v. Union Bank of Tennessee*, 1 Sneed, 115, 118; *Nichol v. Mayor, &c.*, 9 Humph. 252; *City of Memphis v. The Memphis Water Co.*, 5 Heisk. 495; *Memphis City Rd. Co. v.*

Mayor, &c. of Memphis, 4 Cold. 406; *McCallie v. Mayor, &c.*, 3 Head, 317.

³ Art. 9, § 5, of the constitution of 1848.

⁴ *Johnson v. Campbell*, 49 Ill. 316; *Harward v. St. Clair Drainage Co.*, 51 Ill. 130; *Madison County v. People*, 58 Ill. 456.

⁵ *Weightman v. Clark*, 103 U. S. 256; *Trustees v. People*, 63 Ill. 299; *People v. Dupuyt*, 71 Ill. 651; *People v. Trustees of Schools*, 78 Ill. 136; *Hackett v. Ottawa*, 99 U. S. 86. In *Williams v. Louisiana*, 103 U. S. 637, bonds were held void as having been issued in excess of the constitutional limitation allowed in the State. See also *Railroad Co. v. Falconer*, 103 U. S. 821; and see *Thompson v. Perrine*, *Id.* 806, where the invalidity was held cured by the passage of a later act. Bonds issued under an act authorizing their issue on a majority of the electors voting in favor of their issue, were declared void in Missouri, the constitution requiring a two-third vote. *Jarrolt v. Moberly*, 103 U. S. 580. See *Insurance Co. v. Bruce*, 105 U. S. 323, on a municipality being estopped from contradicting the recital in its bonds that they conformed to the statutory requirements. See also *County of Moultrie v. Fairfield*, 105 U. S. 370; *Hannibal v. Fauntleroy*, *Id.* 408; *Lewis v. Commissioners*, *Id.* 739; *Pana v. Bowler*, 107 U. S. 529; *County of Clay v. Society for Savings*, 104 U. S. 579.

cannot be taken which will bind the municipality, or confer upon the municipal authorities the power to make a subscription. The legislative authority to obtain the popular assent is as essential to the validity of the election as it is to the subscription.¹

Bonds of the State of Florida, which had been fraudulently issued and delivered to a railroad company, and notwithstanding a resolution that they should be destroyed, were fraudulently sold; although not recoverable against the State, the railway company was held liable under a statutory mortgage as security for the payment of the bonds to *bonâ fide* holders.²

No legislation can confer upon a municipal corporation authority to contract indebtedness which the constitution expressly declares it shall not be allowed to incur.³ Therefore, where it appeared by evidence, of which the corporation could rightfully avail itself as against a *bonâ fide* holder for value of its bonds, that they created an indebtedness in excess of the amount to which municipal indebtedness was restricted by the constitution, the bonds were held void for want of the legal authority to issue them at the time they were issued; there being no such recitals in the bonds as to estop the corporation, as against a *bonâ fide* holder of the bonds, from denying that they had been illegally issued.⁴

The plaintiffs, having done work for the city of Washington, received a certificate from the city auditor, certifying that he had audited their account and allowed them \$8,451.88. By law in the District of Columbia, these certificates could be surrendered to a board of audit in lieu of interest-bearing bonds of the District.

¹ Allen v. Louisiana, 103 U. S. 80.

² Railroad Companies v. Schutte, 103 U. S. 118. It was contended in this case that even if the railroad company were liable on the bonds, that as they were fraudulently put out by the officers of the company, and were unconstitutional, the recovery must be confined to the amount actually paid for the bonds to the agents of the companies. But the court said: "As we have endeavored to show, the bonds, although void as to the State, are valid as to the company that sold them. Having been put on the market by the company as valid bonds, the company is estopped from setting up their unconstitutionality. As against the company, they occupy in the market the position of commercial securities, and may be dealt with and enforced as such. The company, through their faithless agents, are in a position where they must meet those they have dealt with commercially, and respond accordingly. In commerce, commercial paper means what on its face it represents, regardless of what its maker or

promoter may have got for it. The bonds of the State in the open market purported to be what they called for. The company put them out, and in legal effect, as we think, indorsed them. A *bonâ fide* holder can now require the indorser to respond to his indorsement commercially; that is to say, by paying what he in effect agreed the maker must pay." *Ibid.* p. 144.

³ Law v. The People, 87 Ill. 385; Fuller v. City of Chicago, 89 Ill. 282.

⁴ Buchanan v. Litchfield, 102 U. S. 278. In such case the money received by the corporation for the bonds can be recovered back. Louisiana v. Wood, *Id.* 294. See Louisiana v. Pillsbury, 105 U. S. 278, on legislation impairing the obligation of a contract, in providing a less adequate remedy for the enforcement of the obligations of a municipality to pay the interest on its bonds. And see Louisiana v. Taylor, *Id.* 454. Invalid bonds for want of authority to issue. Wells v. Supervisors, 102 U. S. 625; Ogden v. County of Daviess, *Id.* 634.

After receipt of the certificate, they borrowed from B. the sum of \$3,160 for six months, leaving with him the certificate indorsed in blank, to be returned to them on the repayment of the borrowed money. When it became due they called with the amount and accrued interest to take up the certificate, and found that B. had absconded. Having traced the certificate into the hands of the defendant, they filed a bill against him to compel the restitution of the certificate. The defendant alleged that he had bought the certificate, *bonâ fide*, for value, without notice. The Supreme Court of the District of Columbia made a decree against the defendant. On appeal to the United States Supreme Court, the decree was sustained. The court held that the defendant must be treated as standing in the place of B., and holding the certificate subject to the claim and equities of the plaintiffs. The certificate was not a negotiable instrument which could pass by indorsement and delivery. It was not a promise to pay any sum, nor was it an order upon any one or upon any fund for the payment, or for the delivery of anything of value; and any one taking it took it subject to all the rights and equities of the actual owner as much as if it were tangible property in the streets.¹

After an order had been made by a county court for the issue of bonds, an act was passed requiring that all bonds should be registered and certified or be invalid, it was held that bonds issued under such order, but after the act named came into force, were invalid, in the hands of *bonâ fide* holders, without such registration and certificate.²

Bonds of a township in Kansas, payable to A., a railroad company, or bearer, were duly executed by the township trustee and township clerk, acting in their official capacity as its legal representatives. They recited that they were issued pursuant to an order of the proper officers of the township, made by authority of an act of the legislature which was therein cited, and were ordered by the qualified electors of the township, at an election duly held. An action was brought by a *bonâ fide* holder for value of the interest coupons attached to some of the bonds, who had no notice of any fact impairing their validity. It was held that it was not a defence to the action that at the time of voting and

¹ *Cowdrey v. Vandeburgh*, 101 U. S. 573. The purchasers of non-negotiable demands from others than the original owner of them can take only such rights as he has parted with, except when by his acts he is estopped from asserting his original claim. They must in such case abide by the case of the person through whom they claim. *Cutts v. Guild*, 57 N. Y. 229;

Ingraham v. Disborough, 47 N. Y. 421; *Bush v. Lathrop*, 22 N. Y. 535; *McNeil v. The Tenth National Bank*, 46 N. Y. 325. See *Menasha v. Hazard*, 102 U. S. 81, on conclusiveness of certificate on bonds.

² *Anthony v. County of Jasper*, 101 U. S. 693. See *Bayley v. Taber*, 5 Mass. 285.

issuing the bonds their entire amount was in excess of the proportion which by law they should bear to the taxable property of the township, or that after the vote at said election had been cast in favor of subscribing for stock in B., a railroad company, the subscription was made for stock in A., and said bonds issued in payment therefor; B. having, under a law existing at the time of said election, become merged into and consolidated with A. to form a continuous line of road.¹ The township trustee and the township clerk who made the subscription and issued the bonds in this case were the officially constituted authorities of the township, and when they subscribed to the stock and issued the bonds they acted in their official capacity as the legal representatives of the township, and not as mere agents. In this particular they occupied the position of the County Court in the County of Scotland *v. Thomas*.² They were to all intents and purposes the township in its corporate capacity. In *Harshman v. Bates County*,³ the case was different. There the County Court was the mere agent of a corporation with which it had no official connection. The difference between the two cases is precisely that between a principal and an agent, and it is so expressly said in the County of Scotland Case. In the one case the corporation is bound if the action of the officers is within their corporate powers, while in the other the action must be within the corporate powers delegated to the agent.

Power to issue bonds for public purposes being lodged in the corporate authorities, and they having put on the market negotiable securities which purport on their face to have been issued by a city that had charter authority to issue bonds for municipal purposes, the defendant is estopped from setting up that in point of fact the purpose was not municipal, when the bonds themselves recite that the loan is for municipal purposes, and they have come into the hands of a *bonâ fide* purchaser, who took them relying on such recitals, and without actual notice of the purpose for which they had been issued other than as disclosed on the face of the bonds. The United States Supreme Court held, in *Hackett v. Ottawa*,⁴ that a corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind; and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced; that it would be the grossest injustice, and in conflict with all the past utterances of the court, to permit a municipality having power under some circumstances to issue negotiable securities, to escape liability upon the

¹ *Wilson v. Salamanca*, 99 U. S. 499.

² 94 U. S. 682.

³ 92 U. S. 569.

⁴ 99 U. S. 86, 96.

ground of the falsity of its own representations, made through official agents, and under its corporate seal, as to the purposes with which bonds were issued. Whether such representations are made inadvertently, or with the intention, by the use of inaccurate titles of ordinances, to avert inquiry as to the real object in issuing the bonds, and thereby facilitating their negotiation in the money markets of the county, in either case, the municipality, both upon principle and authority, is cut off from any such defence.¹

A city issued its bonds, engraved with vignettes on bank-note paper, and having the form and appearance of treasury notes of the United States, or bank bills, and it paid them out to its creditors for property sold, materials furnished, and labor performed. It received them for taxes and other dues, and to some extent re-issued them. They formed a considerable portion of the circulating medium of the city and vicinity. Under the authority of a statute of the State, empowering the city council of any city to issue bonds for the purpose of extending the time of paying its indebtedness, which it was unable to meet at maturity, the city passed an ordinance providing for the redemption of the bonds first described. A., the lawful holder of some of them, which had been issued to other parties in payment of valid claims against the city, and were overdue, surrendered them to the city, and received, in lieu of the amount due thereon, bonds for which the ordinance provided, and a credit on the books of the city. The city failing to pay, A. brought suit against it. A recovery was resisted, on the ground that the bonds engraved on bank-note paper had been issued in violation of law, and that the surrender of them was not a valuable consideration for the bonds and the credit received by A. The court held that whether the original bonds were illegal or not, the city had the right to reconsider their act, and to purge the transaction, if it was illegal, of its illegality. They had the right to say: "We had the authority to accept from you, in satisfaction of amounts received by us for legitimate purposes, the sums

¹ Commissioners of Knox County v. Aspinwall, 21 How. 539; Bissell v. City of Jeffersonville, 24 How. 287; Van Hostrop v. Madison City, 1 Wall. 291; Mercer County v. Hackett, *Id.* 83; Supervisors v. Schenck, 5 Wall. 772; Grand Chute v. Winegar, 15 Wall. 355; St. Joseph Township v. Rogers, 16 Wall. 644; Town of Coloma v. Eaves, 92 U. S. 484; County of Moultrie v. Savings Bank, *Id.* 631; Marey v. Township of Oswego, *Id.* 637; Humboldt Township v. Long, *Id.* 642; Commissioners v. January, 94 U. S. 202; Commissioners v. Bowles, *Id.* 104; Cromwell

v. County of Sac, 96 U. S. 51; San Antonio v. Mehaffy, *Id.* 312; County of Warren v. Marey, 97 U. S. 96; Mealey v. St. Clair County, 3 Dill. 163; Allen v. Cameron, *Id.* 175; Wyatt v. City of Green Bay, 1 Biss. 292; Town of Weyauwega v. Ayling, 99 U. S. 112; Supervisors v. Galbraith, 99 S. C. 214; Brooklyn v. Insurance Co., *Id.* 362; Orleans v. Platt, 99 U. S. 676; The Royal British Bank v. Turquand, 6 El. & Bl. 325; Lyans v. Munson, 99 U. S. 684; Block v. Commissioners, *Id.* 686.

in question. We did so receive and expend for legitimate purposes. We erred in making the payment to you in an objectionable form. We now pay our just and lawful debts by cancelling the bank-notes issued by us, and delivering to you obligations in the form of bonds, to which form there is no legal objection." The case was compared to one where the city borrows on its note at usurious interest, from a bank, a sum of money; the bank subsequently cancelling the illegal note, refunding the excessive interest, and receiving a new note for a lawful amount. The new note would be valid and collectible.¹ The right to recover on the bonds was sustained.²

The purchaser, in good faith, of bonds issued by a county for railroad stock, where the subscription by the county to the railroad, the receipt and holding of the stock by the county, the necessary assent of the qualified voters that such subscription should be made, the actual issuing of the bonds, and their purchase by the plaintiff without knowledge of any objection to them, were conceded, was held entitled to recover the amount of the bonds; the defendants not being permitted to urge as a defence that such railroad company was not a legally organized corporation when the election was held, and did not become such until after that period.³

¹ *Kent v. Walton*, 7 Wend. 256.

² *Little Rock v. National Bank*, 98 U. S. 308; *Hitchcock v. Galveston*, 96 U. S. 341; *The Mayor v. Ray*, 19 Wall. 468; *Police Jury v. Britton*, 15 Wall. 566; *Mullarky v. Cedar Falls*, 19 Iowa, 24; *Sykes v. Laffery*, 27 Ark. 407; *Wright v. Hughes*, 13 Ind. 109. So where the consideration of a contract declared void by statute is morally good, a repeal of the statute will validate the contract. *Washburn v. Franklin*, 35 Barb. 599. In *Key v. Goodwin*, 4 Moo. & P. 341, 351, Tindal, C. J., said: "I take the effect of repealing a statute to be to obliterate it as completely from the records of the parliament as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted, and concluded while it was an existing law." See *Butler v. Palmer*, 1 Hill, 334; *Curtis v. Leavitt*, 15 N. Y. 85; *The People v. Livingston*, 6 Wend. 526. A repealing clause is such an express enactment as necessarily divests all inchoate rights which have arisen under the statute which it destroys. It was held, in the *Central Bank v. Empire Stone Dressing Co.*, 26 Barb. 23, that a repeal of an act which made a contract illegal on the grounds of public policy, repealed also the consequences of the act, even as to contracts entered into while it was in force.

³ *County of Daviess v. Hindekoper*, 98 U. S. 98. The court held that, if assent is given to a specified aid to a railroad named, a perfection of the railway corporation before the subscription was made and the bonds issued was a compliance with the statute. The decision of the voters, and the action of the County Court, under such circumstances, in issuing the bonds, and subsequent action in receiving and retaining their benefits, gives validity to the bonds, and they are to be taken as valid instruments. *Town of Coloma v. Eaves*, 92 U. S. 484, 491; *County of Randolph v. Post*, 93 U. S. 502; *County of Leavenworth v. Barnes*, 94 U. S. 70; *Commissioners of Douglass County v. Bolles*, *Id.* 104; *Commissioners of Johnson County v. Thayer*, *Id.* 631; *County of Cass v. Johnson*, 95 U. S. 360; *City of St. Louis v. Shields*, 62 Mo. 247; *Smith v. Clark County*, 54 Mo. 58, 81. In an action on bonds from a municipality to a company, a plea of *ultra vires* corporation will not be permitted where the municipality has solemnly admitted the company's corporate capacity by entering into the obligation and signing the bonds. *State v. Carr*, 5 N. H. 367; *President, &c. v. Thompson*, 20 Ill. 200; *Hamilton v. Carthage*, 24 Ill. 22; *Kayser v. Bremen*, 16 Mo. 88.

The consolidation of one railroad company with another company does not extinguish the power of a county to subscribe, nor destroy the privilege of the company to receive subscriptions; and this, notwithstanding that before such consolidation the constitution of the State has been altered, making such subscriptions contingent upon the vote of electors not previously necessary; and although the subscriptions be made to the consolidated company, and the bonds issued after the provision in the constitution has become operative.¹

In the *County of Warren v. Marcy*,² the court, adhering to its former decisions,³ held that if a municipal body has lawful power to issue bonds or other negotiable securities, dependent only upon the adoption of certain preliminary proceedings, such as a popular election of the constituent body, the holder in good faith has a right to assume that such preliminary proceedings have taken place, if the fact be certified on the face of the bonds themselves, by the authorities whose primary duty it is to ascertain it. And this, although prior to the issuing of the bonds in question, proceedings had been commenced to prevent their issue; the doctrine of *lis pendens* not applying to negotiable paper.⁴

A city council, which was limited by the city charter from borrowing for general purposes more than \$50,000, and which had

¹ *County of Schuyler v. Thomas*, 98 U. S. 169. See *County of Scotland v. Thomas*, 94 U. S. 682; *Smith v. County of Clark*, 54 Mo. 58; *The State v. Sullivan County*, 51 Mo. 522; *The State v. Greene County*, 54 Mo. 540; *County of Callaway v. Foster*, 93 U. S. 567; *State v. Maysville, &c. R. R. Co.*, 13 B. Mon. 1; *The Philadelphia, &c. R. R. Co. v. Maryland*, 10 How. 376; *Tomlinson v. Branch*, 15 Wall. 460; *Branch v. City of Charleston*, 92 U. S. 677; *The Hannibal, &c. R. R. Co. v. Marion County*, 36 Mo. 294, 304; *Hanna v. The Cincinnati, &c. R. R. Co.*, 20 Ind. 30. In the *County of Bates v. Winters*, 97 U. S. 83, the court held, reversing the decision of the court below, that as the recitals in the bonds showed on their face that the bonds had been issued without legal authority, there could be no *bonâ fide* holders of them who could recover under them. In *Nauvoo v. Ritter*, 97 U. S. 389, a demurrer to pleas tendering an issue as to the authority of the municipality to issue bonds was sustained, the bonds upon their face by their recitals showing such authority.

² 97 U. S. 96.

³ *Commissioners of Johnson County v. January*, 94 U. S. 202; *Commissioners of Douglass County v. Bolles*, 7b. 104, 108; *Town of Coloma v. Eaves*, 92

U. S. 484, 488; *Lynde v. The County*, 16 Wall. 6.

⁴ See *County v. Rogers*, 7 Wall. 181; *Murray v. Lylburn*, 2 Johns. Ch. 441; *Kieffer v. Ehler*, 18 Pa. St. 388; *Winston v. Westfeldt*, 22 Ala. 560; *Stone v. Elliott*, 11 Ohio St. 252; *Mims v. West*, 38 Ga. 18; *Durant v. Iowa County*, 1 Woolw. 69; *Leitch v. Wells*, 48 N. Y. 535; *City of Lexington v. Butler*, 14 Wall. 283; *National Bank of Washington v. Texas*, 20 Wall. 72; *Olcott v. Supervisors*, 16 Wall. 678. And see *Murray v. Ballou*, 1 Johns. Ch. 566, which is the leading American case on the subject of *lis pendens*; and see *ante*, p. 382, n. 3, on this subject. The court held, in the *County of Ray v. Vansycle*, 96 U. S. 675, in a case of doubt as to the validity of municipal bonds, that the doubt existing should be resolved in favor of the *bonâ fide* holder of bonds, where the agents of the municipality, invested with the power of protecting the interests of the municipality, and charged with that duty, had been parties to the issuing of the bonds, and that the county was concluded, under the facts, by the acts of their official agents, and by their own failure, either intentionally or from neglect, to assert by appropriate proceedings the legal right which they claimed they had.

the power to contract for grading and paving its streets, and which had contracted for the doing of such work to an amount greater than \$50,000, to be paid for in its bonds, was held liable even on the assumption of such bonds being illegal, for damages caused the plaintiffs, by the defendants, by the breach or abrogation of the contract.¹

Legislative authority having been given to a municipality to issue bonds payable in not less than five nor more than thirty years, was held to be substantially complied with where bonds were dated Sept. 10, payable in thirty years from Oct. 15, and were not registered by the auditor of the State until Oct. 17. The court held that they were practically thirty-year bonds; their legal effect being the same as if the date of Oct. 15 had been inserted instead of Sept. 10.²

The statutes of the State authorized the levying of a tax for county purposes of one-half per cent. In addition to this, authority was given to counties to subscribe for stock, and to "issue bonds therefor, and levy a tax to pay the same not to exceed one-twentieth of one per cent upon the assessed value of taxable property, for each year." The United States Supreme Court held³ (Waite, C. J., and Miller, and Bradley, JJ., dissenting), reversing the decision of the court below, that the special tax provided for was not thereby made the only fund liable for the bonds,

¹ *Hitchcock v. Galveston*, 96 U. S. 341. The promise to give bonds to the plaintiffs in payment of what they undertook to do was not a violation of an act expressly prohibited by its charter or some other law, but was a case where legislative power to do the act had not been granted. The promise to give the bonds to the plaintiffs was, therefore, at farthest, only *ultra vires*; and in such a case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract. Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform. In the *State Board of Agriculture v. The Citizens' Street Ry. Co.*, 47 Ind. 107, it was held that although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise and in execution of the contract to expend money and perform his part thereof, the corporation is liable on the contract. See also *Allegheny City v. Me-*

Clurkin, 14 Pa. St. 81; *Maher v. Chicago*, 38 Ill. 266; *Oneida Bank v. Ontario Bank*, 21 N. Y. 499; *Argenti v. City of San Francisco*, 16 Cal. 256; *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *State Bank v. Leavitt*, 14 N. Y. 162; *Leavitt v. Curtis*, 15 N. Y. 9; *Chicago v. The People*, 48 Ill. 416; *Allen v. City of Janesville*, 35 Wis. 403; *Sleeper v. Bullen*, 6 Kan. 300; *Louisville v. Hyatt*, 5 B. Mon. 199; *Kearney v. City of Covington*, 1 Mete. (Ky.) 339; *Swift v. Williamsburgh*, 24 Barb. 427.

² *Township of Rock Creek v. Strong*, 96 U. S. 277. The court held that, substantially, the legislative direction was followed, and that the doctrine of Commissioners of Marion County v. Clark, 94 U. S. 279, was applicable to the case. In that case the bonds bore date Sept. 3, 1872, but they were not issued and delivered until the 4th of November following; and although they were nominally for a longer period than that for which they could be legally issued, computing the time from the date, yet they were not so, computing the time, as it should be computed, from the time of their execution, issue, and delivery.

³ *United States v. County of Clark*, 96 U. S. 211.

but was provided as an additional security for their payment, the funds of the county otherwise being liable for such bonds as for any other debt.¹

¹ We think the decision of the majority judges is more than doubtful. The provision of the charter is that the municipality desiring so to do may subscribe to the capital stock of a company, "and may issue bonds therefor, and *levy a tax to pay the same, not to exceed one-twentieth of one per cent* upon the assessed value of taxable property for each year." They are here empowered (1) to subscribe for stock; (2) *to issue bonds therefor*; (3) to levy a tax *to pay the same*, and (4) such tax, *"to pay the same," is not to exceed one-twentieth of one per cent*. We scarcely see how a limitation on the powers of a municipality could be more clearly expressed than it here is; and we think, clearly, with Waite, C. J., and Miller and Bradley, J.J., who concurred with the decision of the court below, that "the act under which the bonds were issued limited the power of taxation for their payment, and that the holders were chargeable with notice of the limitation." A case in Missouri, *State v. Shortridge*, 56 Mo. 126, holding in accordance with the view expressed by the minority judges, and with the holding in the Circuit Court, is, we think, better decided than was the case in the United States Supreme Court. In *State v. Shortridge*, 56 Mo. at p. 129 *et seq.*, the court say: "The point for us to consider is whether the County Court of Macon is prohibited by section thirteen of the charter of the railroad company above quoted from levying in one year a tax of more than one-twentieth of one per cent upon the assessed value of the taxable property in the county. The language of the section is plain and positive, and will hardly admit of any other than a literal construction. It reads that the county court 'may issue bonds therefor, and *levy a tax to pay the same, not to exceed one-twentieth of one per cent* upon the assessed value of the taxable property for each year.' . . . The very law authorizing the issue of the bonds in question also limits the power of the County Court to levy a tax beyond one-twentieth of one per cent for their payment in any one year. This limitation was enacted, not for the bondholders, but for the benefit of the taxpayers, so that they might not be harassed with a railroad tax in any one year too grievous to be borne . . . The only taxes that can be levied by counties are such as are provided for by the statute. The power of taxation is a sovereign right which belongs alone to the State, and which can

only be exercised in pursuance of laws passed by the legislature for that purpose. There can be no such thing as an implied power in a County Court to levy a tax. The power must be clearly and expressly given by statute. We are called upon to compel the County Court of Macon County by mandamus to do that which the law does not authorize, but expressly prohibits. In my judgment this mandamus was properly refused." In *United States v. County of Clark*, 96 U. S. 211, there is an attempt made to distinguish that case from *State v. Shortridge*, 56 Mo. 126, which we do not think is successful. In the one case the mandamus was granted, and in the other it was refused. Both applications were for payments in excess of those provided for in the statute. The one application was refused on the ground that the statute did not authorize the excessive payment; the other was granted on the ground that the statute did authorize the excessive payment. The court, in the one case, decided that it had no power to make the order for such payment; the court, in the other case, decided that it had such power. The distinction which was sought to be made was, we think, a distinction without a difference, namely, that while the court had no power to order the payment by a special tax in excess of the one-twentieth of one per cent limited by the statute, it had the power to order the payment of a sum greater than the limitation fixed, to be taken out of other taxes; *i. e.*, the tax called a special tax shall be levied for the one-twentieth of one per cent, and the other taxes shall be increased (without calling the increase a special tax) beyond the limitation fixed by the statute. The case of *State v. Shortridge*, 56 Mo. 126, was decided expressly on the ground that the taxpayers might not be harassed with a railroad tax in any one year beyond the limit fixed by the statute. The case of *United States v. County of Clark*, 96 U. S. 211, decided that, notwithstanding the limitation expressly fixed in the statute, they might be. The cases, we think, are in direct antagonism, and that it is only by excessive refinement to an intangible point that they can be deemed otherwise. The holding of the minority judges in *United States v. Clark*, 96 U. S. 211, and of the court in *State v. Shortridge*, 56 Mo. 126, we think essentially the same, namely, that the act under which the bonds were issued limited the power of

In *New Orleans v. Clark*,¹ it was held that where an ordinance provided that a gas company was to "guarantee" bonds to be issued to them by a municipality, bearing interest, payable semi-monthly, "and assume the payment of the principal thereof at maturity;" the guaranty of the company for the payment of the principal *and interest* was within the ordinance. It was claimed that the guaranty as to the interest was unauthorized by the ordinance; but the court held that that view was not justified by the language used in it. The *guaranty* of the bonds embraced both the principal and the interest. The payment of bonds, without other designation, always implies a payment of the principal sum and its incident; and a guaranty, in similar terms, covers both. The ordinance contemplated two undertakings by the company; one to the bondholder, and the other to the city. The guaranty was to be for the security of the bondholder. It was to be an undertaking to answer for the city's liability, and to be collateral to it. The other undertaking was to be for the security of the city, by placing the company under obligation to provide for the payment of the principal of the bonds at their maturity; an obligation which otherwise would not have existed.

Where municipal bonds are invalid from some irregularity or omission in the proceedings by which they were created, so that they could not be enforced in the courts of law, but they still represent an equitable claim against the municipality, for which an equivalent has been received, and payment of which can only be escaped on technical grounds, the power of the legislature to pass an act requiring the payment of such claim is clear.² And the constitution of a State which provides that no retroactive law shall be passed, does not forbid such legislation. A law requiring a municipal corporation to pay a demand which is without legal obligation, but which is equitable and just in itself, being founded upon a valuable consideration received by the corporation, is not a retroactive law; any more so than an appropriation act providing for the payment of a pre-existing claim. The inhibition is to prevent retrospective legislation affecting individuals, and thus protect vested rights from invasion.³

taxation "for their payment," and that relief could not be looked for from the courts, but from the legislature. See in accord with *State v. Shortridge*, 56 Mo. 126; *Clark v. The City of Davenport*, 14 Iowa, 494; *Supervisors v. United States*, 18 Wall. 71. The language of Strong, J. (who also delivered the judgment of the court in *United States v. Clark*), in *Supervisors v. United States*, *ib.* 83, where he refers to the notice that the holders of

the obligations of a municipality had of the conditions connected with the levying, under the laws of the State, of a special tax for their payment, is, we think, as applicable in the one case as in the other.

¹ 95 U. S. 644.

² *New Orleans v. Clark*, 95 U. S. 644; *The People v. Burr*, 13 Cal. 343; *Town of Guilford v. Supervisors, &c.*, 18 Barb. 615; 13 N. Y. 143.

³ *New Orleans v. Clark*, *supra*.

The majority of the court in *County of Cass v. Johnston*,¹ on the question of the validity of bonds, held, following local decisions in Missouri and other cases,² that, where the constitution required the authority of "two-thirds of the qualified voters" of the municipality, to authorize the issuing of the bonds, two-thirds of the voters who actually voted on the question were sufficient to justify the issuing of the bonds, although these might not represent "two-thirds of the qualified voters" of the municipality. The minority judgment by Bradley and Miller, JJ., dissenting from this holding, we think the better one. Suppose that, as in other instances, the election could only be held on the requisition of "two-thirds of the qualified voters of the municipality," the registration list would, unquestionably, furnish the test as to whether there was the necessary number of requisitionists to warrant the holding of the election. The provision that the credit shall not be incurred "unless two-thirds of the qualified voters of such municipality . . . shall assent thereto," we think is equally as clear. The majority of the court, we think, are not at all warranted in the conclusion they deduced from the holding in *State v. Winklemeier*.³ There the court say: "The act expressly requires a majority of the legal voters; that is, *of all the legal voters of the city*, and not merely of all those who at a particular time choose to vote upon the question." And although the court afterwards referred to the fact that there had been more than 13,000 votes polled, of which only 5,000 were in the affirmative, saying, — "It is evident that the vote of 5,000 out of 13,000 is not the vote of a majority," that meant no more than declaring that as a majority of "all the legal voters" was required, and as there was not even a majority of the votes actually polled, it was clear that there there was not a majority polled of "all the legal voters;" the part, at all events, not being greater than the whole. And, as Bradley, J. shows, an analogous clause in the same constitution⁴ which declares that "no bill shall be passed unless by the assent of a majority of all the members elected to each branch of the General Assembly," has always been construed as meaning that no law can be passed unless a majority of the members vote for it, whether all are present or not. So, in another case, in even more exact parallelism with *County of Cass v. Johnston*,⁵ where by sec. 30 of art. 4 of the constitution, it is provided

¹ 95 U. S. 360.

² See *State v. Mayor of St. Joseph*, 37 Mo. 270; *State v. Binder*, 38 Mo. 450; *State v. Sutterfield*, 54 Mo. 391; *St. Joseph Township v. Rogers*, 16 Wall. 644; *Louisville & Nashville R. R. Co. v. The County Court of Davidson*, 1 Sneed, 638,

Taylor v. Taylor, 10 Minn. 107; *People v. Warfield*, 20 Ill. 159; *People v. Garner*, 47 Ill. 246; *People v. Wiant*, 43 Ill. 263.

³ 35 Mo. 103.

⁴ Act IV. of the Constitution of Missouri of 1865.

⁵ 95 U. S. 360.

“that the General Assembly shall have no power to remove the county-seat of any county unless two-thirds of the qualified voters of the county, at a general election, shall vote in favor of such removal,” it was held that these terms required a positive vote in the affirmative of two-thirds of the qualified voters of the county; the court saying,—“There is no difficulty in ascertaining what that number is, since the same constitution provides for a registration, and points out who the qualified voters are.”¹ Had the clause required only the assent of two-thirds majority of such of the voters of the county as voted at such election, the meaning would be clear, and *County of Cass v. Johnston* would have been correct; but, as it required the assent of “*two-thirds of the qualified voters of the county*,” we think it is equally as clear that the assent of a less number than “two-thirds of the qualified voters of the county” was not sufficient, and that *County of Cass v. Johnston* was wrongly decided, and that *Harshman v. Bates County*,² which it affected to overrule, is the better law.

The charter of a railway company contained the power to construct a branch, and gave the County Court power to subscribe stock for it, and an act of the State legislature authorized such branch and stock to be an independent interest. The bonds of the county showed that they were made to the parent company, to the use and in the name of the branch, to aid in building said branch. The court held, that the purchaser, therefore, was apprised by the law that power existed in the County Court to issue such bonds without any election of the people, and, there being nothing on their face to show that they were not regularly issued, it was not incumbent on the purchaser to inquire whether the railroad company had pursued all the regular steps necessary to entitle it to receive the bonds. The agents of the branch road having had the bonds for sale, the purchaser had a right to presume that they were lawfully entitled to them; and the fact that, after the subscription was made, but before the bonds were issued, the parent company had sold and assigned a portion of its route with its franchises to another company, did not alter the case.³

A prohibition in the constitution of a State against the legislature's authorizing municipal subscriptions or aid to private corporations, does not take away any authority previously granted. It only limits the power of the legislature to grant such authority for the time to come.⁴ And, where such a power has been

¹ *State v. Sutterfield*, 54 Mo. 391.

² 92 U. S. 569.

³ *County of Henry v. Nicolay*, 95 U. S. 619. The court in the *County of Cass v. Gillett*, 100 U. S. 585, followed as authori-

ties *County of Henry v. Nicolay*, 95 U. S. 619, and *County of Warren v. Marcy*, 97 U. S. 107.

⁴ *County of Scotland v. Thomas*, 94 U. S. 682; *The State v. Sullivan County*,

granted, the fact that the company which has been granted such aid has consolidated with another company, will not affect the right of the municipality to subscribe, nor the privilege of the company to receive the aid, nor affect the bonds of the municipality issued for such aid.¹

A municipal corporation cannot issue bonds in aid of extraneous objects without legislative authority, of which all persons dealing with such bonds must take notice at their peril.²

Not only the courts, but individuals, are bound to know the law, and cannot be allowed to plead ignorance of it. The holder of municipal bonds can claim no indulgence on that score, and can take no advantage from the allegation that he is a *bonâ fide* purchaser without notice. Want of legislative authority by the municipality to issue bonds is a fatal objection to their validity, no matter under what circumstances the holder may have obtained them.³

Bonds of the kind executed by a municipal corporation to aid in the construction of a railroad, if issued in pursuance of a power conferred by the legislature, are valid commercial instruments, and, if purchased for value in the usual course of business before they are due, give the holder a good title, free of prior equities between antecedent parties, to the same extent as in case of bills of exchange and promissory notes. Such a power is frequently

51 Mo. 522; *The State v. Greene County*, 54 Mo. 540; *County of Callaway v. Foster*, 93 U. S. 567; *State v. Maysville & L. Railroad Co.*, 13 B. Mon. 1.

¹ *County of Scotland v. Thomas*, 94 U. S. 682; *The State v. Greene County*, 54 Mo. 540; *The Philadelphia & W. Railroad Co. v. Maryland*, 10 How. 376; *Tomlinson v. Branch*, 15 Wall. 460; *Branch v. City of Charleston*, 92 U. S. 677; *Smith v. County of Clark*, 54 Mo. 58; *The Hannibal & St. J. Railroad Co. v. Marion County*, 36 Mo. 294, 304; *Hanna v. The Cincinnati, Fort Wayne & Ch. R. R. Co.*, 20 Ind. 30; *Town of East Lincoln v. Davenport*, 94 U. S. 801.

In a suit by a *bonâ fide* owner of the coupons of municipal bonds, questions of form merely, or irregularity, or fraud, or misconduct, on the part of the agents of the town, cannot be considered. There must be authority in the municipality to issue the bonds by the statutes of the State. If this cannot be found, the holder must fail. If it exists, he is entitled to recover. The officers of the municipality are not the agents of the owner of the bonds, but are the agents of the municipality, and if there has been misconduct on their part, the municipality rather

than a stranger must bear the consequences. *Town of East Lincoln v. Davenport*, 94 U. S. 801. A municipality is estopped from denying its liability on their bonds, in the hands of an innocent holder, where the bonds have been issued under the order of the County Court, that court being authorized by law to order the issuing of such bonds, even though the County Court in ordering such issue may have had some misapprehension in the matter. *County of Cass v. Shores*, 95 U. S. 375. In the *County of Leavenworth v. Barnes*, 94 U. S. 70, the United States Supreme Court, following the decisions of the Supreme Court of the State, held municipal bonds to be good as to a *bonâ fide* purchaser of the bonds without notice of the defences, although the bonds had been issued without a strict compliance with all the preliminary formalities required.

² *Town of South Ottawa v. Perkins*, 94 U. S. 260; *Pendleton County v. Amy*, 16 Wall. 297; *Kenicott v. The Supervisors*, 16 Wall. 452; *St. Joseph Township v. Rogers*, *Ibid.* 644; *Town of Coloma v. Eaves*, 92 U. S. 484.

³ *Town of South Ottawa v. Perkins*, 94 U. S. 260.

conferred to be exercised in a special manner, or subject to certain regulations, conditions, or qualifications; but if it appears that the bonds issued show by their recitals that the power was exercised in the manner required by the legislature, and that the bonds were issued in conformity with the prescribed regulations and pursuant to the required conditions and qualifications, proof that any or all of the recitals are incorrect will not constitute a defence to the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulations, conditions, or qualifications which it is alleged were not fulfilled.¹

A municipality must have legislative authority to subscribe to the capital stock of a bridge company, before its officers can bind the body politic to the payment of bonds purporting to be issued on that account. Municipal officers cannot rightfully dispense with any of the essential forms of proceeding which the legislature has prescribed for the purpose of investing them with power to act in the matter of such a subscription. If they do, the bonds they issue will be invalid in the hands of all that cannot claim protection as *bonâ fide* holders. To be a *bonâ fide* holder one must be himself a purchaser for value without notice, or the successor of one who was. Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence. Every dealer in municipal bonds which, upon their face, refer to the statute under which they were issued, is bound to take notice of the statute and of all its requirements. And where bonds, by their recitals, show that the bonds were irregularly issued, and not binding upon the municipality, they carry upon their face unmistakable evidence that the forms of the law under which they purported to have been issued, have not been complied with. While a purchaser may be protected, as he sometimes is, by false recitals in municipal bonds, the municipality has the benefit of those recitals that are true. And where coupons, detached from the bonds, are purchased, and on their face they refer to the bonds and purport to be for the interest due thereon, the purchaser is put upon inquiry for the bonds, and is charged with notice of all that they contain.²

¹ Commissioners of Marion County v. Clark, 94 U. S. 278; St. Joseph Township v. Rogers, 16 Wall. 659; Town of Coloma v. Eaves, 92 U. S. 484.

² McClure v. Township of Oxford, 94 U. S. 429; George v. Oxford Township, 16 Kans. 72. A State act passed prohibit-

ing a municipality from becoming a subscriber to the capital stock of a railway company, does not render invalid the bonds of a municipality issued for stock, subscribed for after the passage of the prohibiting act, but under an act in force passed before the prohibiting act was en-

Where the authority of the majority of voters was required to authorize the issue of county bonds, and the County Court judge, who was the officer designated by the statute to decide whether the voters had given the required sanction, executed and issued the bonds, and the requisite popular sanction was set forth on their face, it was held, in *Lynde v. The County*,¹ as a settled rule of law, that where a particular functionary is clothed with the duty of deciding such a question, his decision, in the absence of fraud or collusion, is final. It is not open for examination, and neither party can go behind such decision. And, under such circumstances, where the bonds are in the hands of a *bonâ fide* purchaser, he is not bound to look beyond the averment on their face.

In *National Bank of Washington v. Texas*,² where there was no evidence that bonds of the United States which had been issued to Texas in 1851, and after the rebellion had broken out, and while it existed, were transferred by Texas, were issued for unlawful purposes, the bonds being payable to bearer; the fact that in 1851, Texas had passed an act providing that the bonds should not be available in the hands of holders until they were indorsed by the governor of the State, neither caused those bonds to be unavailable in the hands of the holders where they were *bonâ fide* taken by them unindorsed; nor did the want of such indorsement imply that they had been obtained by the holders for unlawful purposes. As far as the cases of *Texas v. White*,³ and *Texas v. Hardenberg*⁴ differed with this holding, on this latter point, these cases were disapproved.⁵

acted. *County of Randolph v. Post*, 93 U. S. 502, 508.

¹ 16 Wall. 6.

² 20 Wall. 72.

³ 7 Wall. 718.

⁴ 10 Wall. 68.

⁵ The court held in *Texas v. White*, 7 Wall. 700, and *Texas v. Hardenberg*, 10 Wall. 68; 1. That when a State by public statute requires the indorsement of its governor as a prerequisite to the valid transfer of bonds belonging to it, and payable to itself or bearer, the holder of such bonds, without such indorsement, will have no title as against the State, unless he can show the consent of the State otherwise given to the transfer. 2. That an act repealing the statute requiring the indorsement of the governor, passed by the legislature when the State was in rebellion against the United States, is a nullity as to bonds issued without such indorsement, and for the purpose of aiding the rebellion. 3. That such bonds remain the property of the State, and may be reclaimed, or the proceeds thereof recovered in a proper ac-

tion by that State when the rebellion has ceased, against any one in possession of the same, with notice of the intent with which they were issued and used. 4. That the existence of the rebellion at the time of the repealing act was a public fact with notice of which all persons were charged; and, that, when the bonds were purchased after they had become payable, the purchaser took them subject to all the equitable rights of the State when its relations to the Union had been restored. But, in *Huntington v. Texas*, 16 Wall. 402, the court held, that if the bond were issued and used for a lawful purpose, the title passed to the holder unaffected by any claim of the State. And where there is proof that a large proportion of the bonds issued without the indorsement of the governor, were, in fact, issued for legitimate objects, and were applied to legitimate purposes, no presumption could arise, from the absence of that indorsement, that the particular bonds which might be the subject of controversy had been issued without authority and for an unlawful

purpose. The presumption in such a case, especially after their payment by the United States, would be in favor of the holders of the bonds, and not against them. For the United States were the obligors of the bonds, and as it was against the United States that the rebellion had been waged, it was primarily their duty to ascertain and decide whether the bonds had or had not been issued and used in aid of rebellion, and had, therefore, presumptively passed into the hands of hold-

ers not entitled to payment as against the reconstituted State. The validity of the alienation of the bonds by the government actually in control of the State depends on the object and purpose of the alienation. If that was just in itself and laudable, the alienation was valid. If, on the contrary, the object and purpose were to break up the Union, and to overthrow the constitutional government of the Union, the alienation was invalid.

BOOK II.

PART VI.

SALES BY PARTIES WHERE FIDUCIARY RELATIONS EXIST.

FIDUCIARY relations exist between the directors and stockholders of a company, as well as between co-partners in business. We have already¹ discussed some matters relating to sales as between directors and stockholders, and in the Part following this we consider some questions of a special character relating to partnership sales. This Part we devote to the examination of the subject connected with other parties between whom fiduciary relations exist.

The relationship between a trustee and a *cestui que trust* is one, and the leading one, of a fiduciary character; and a fiduciary relationship may generally be described as one in respect of which, if a wrong arise, the same remedy exists against the wrong-doer on behalf of the principal as would exist against a trustee on behalf of the *cestui que trust*.²

¹ In Book II. Part V. *ante*.

² *Per* Fry, J., in *In re West of England and South Wales District Bank*, 11 Ch. Div. 772, 778, and *per* Jessel, M. R., in *In re Hallett's Estate*, 13 Ch. Div. 696, 712. In this latter case, it was held, that if money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his bankers, the person for whom he held the money can follow it, and has a charge on the balance in the bankers' hands; that the rule in *Clayton's Case*, 1 Mer. 572, attributing the first drawings out to the first payments in, does not apply; and that the drawer must be taken to have drawn out his own money in preference to the trust money.

The rule in *Clayton's Case*, 1 Mer. 572, 608, specifically is, that, in cases, as of a banking account, where there has been a continuation of dealings, the appropriation, in the absence of express declaration, can only be made on the ground of presumption arising from the priority of receipts and payments. It is the first item

on the debit side of the account that is discharged, or reduced, by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. If any other appropriation is to be made, it is incumbent on the creditor to declare his intention at the time of payment. But when a trustee pays trust-money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as much and as effectually as the money so paid could have done, had it specifically been placed by the trustee in a particular repository and so remained; that is to say, if the specific debt shall be claimed on behalf of the *cestuis que trust*, it must be deemed specifically theirs, as between them, on the one hand, and the trustee, and his executors and the general creditors after his death, on the other. This state of things would not be varied by the cir-

The principle relating to contracts between parties where fiduciary relations exist between them, has been long settled by many

circumstance of the bank holding also for the trustee, or owing also to him, money in every sense his own. *Pennell v. Deffell*, 4 De G. M. & G. 383. And as between the *cestui que trust* and trustee the mixing up of the fund is immaterial so long as there is a fund on which the *cestui que trust* can lay his hands. And it makes no difference that instead of trustee and *cestui que trust*, it is a case of fiduciary relationship. *In re West of England and South Wales District Bank*, 11 Ch. Div. 772, 778; *per Fry, J.*; but who, in the case really holds the contrary, but is overruled on the point, and the above stated principle sustained, in *In re Hallett's Estate*, 13 Ch. Div. 708.

The modern doctrine of equity as regards property disposed of by persons in a fiduciary relation is a very clear and well-established doctrine, and is thus laid down by *Jessel, M. R.*, in the last above cited case, *In re Hallett's Estate*, 13 Ch. Div. 708: "You can, if the sale was rightful, take the proceeds of the sale, if you can identify them. If the sale was wrongful, you can still take the proceeds of the sale, in a sense adopting the sale for the purpose of taking the proceeds, if you can identify them. There is no distinction, therefore, between a rightful and a wrongful disposition of the property, so far as regards the right of the beneficial owner to follow the proceeds. But it very often happens that you cannot identify the proceeds. The proceeds may have been invested, together with money belonging to the person in a fiduciary position, in a purchase. He may have bought land with it, for instance, or he may have bought chattels with it. Now, what is the position of the beneficial owner as regards such purchases? I will, first of all, take his position when the purchase is clearly made with what I will call, for shortness, the trust-money, although it is not confined, as I will show presently, to express trusts. In that case, according to the now well-established doctrine of equity, the beneficial owner has a right to elect either to take the property purchased or to hold it as a security for the amount of the trust-money laid out in the purchase; or, as we generally express it, he is entitled, at his election, either to take the property or to have a charge on the property for the amount of the trust-money. But in the second case, where a trustee has mixed the money with his own, there is this distinction, that the *cestui que trust*, or beneficial owner, can no longer elect to take the property, be-

cause it is no longer bought with the trust-money simply and purely, but with a mixed fund. He is, however, still entitled to a charge on the property purchased for the amount of the trust-money laid out in the purchase; and that charge is quite independent of the fact of the amount laid out by the trustee. The moment you get a substantial portion of it furnished by the trustee, using the word 'trustee' in the sense I have mentioned, as including all persons in a fiduciary relation, the right to the charge follows." This is a very clear exposition of the law on the subject; and, in this connection, there is no distinction between an express trustee or an agent or a bailee, or a collector of rents, or anybody else in a fiduciary position, because the beneficial ownership is the same wherever the legal ownership may be. If you have goods bargained and sold to a man upon trust, to sell and hand over the net proceeds to another, that other is the beneficial owner; but if instead of being bargained and sold, so as to vest the legal ownership in the trustee, they are deposited with him to sell as agent, so that the legal ownership remains in the beneficial owner, the rights of the beneficial owner are not different in a court of equity, he being entire beneficial owner in both cases. The moment you get into a court of equity, where a principal can sue an agent as well as a *cestui que trust* can sue a trustee, and establish the existence of a fiduciary relation, the modern rules of equity, as regards following trust money, apply. *Ibid.*

The old doctrine, making a distinction between following money in the hands of one in a fiduciary relation and following goods, as in *Whitecomb v. Jacob*, 1 Salk. 161, is now exploded. Thus, in that case, it is said: "If one employs a factor and entrusts him with the disposal of merchandise, and the factor receives the money and dies indebted in debts of a higher nature, and it appears by evidence that this money was vested in other goods and remains unpaid, those goods shall be taken as part of the merchant's estate and not the factor's [that is, you may follow the money or the goods]; but if the factor have the money, it shall be looked upon as the factor's estate, and must first answer the debts of a superior creditor, etc.; for, in regard that money has no ear mark, equity cannot follow that in behalf of him that employed the factor." *Ryall v. Rolle*, 1 Atk. 165, is to the same effect, namely, that you can follow the

well-known decisions, yet the courts have always been careful not to fetter this useful jurisdiction of courts of equity over the deal-

goods, but you cannot follow money. And so are *Ex parte Dumas*, 1 Atk. 232; *Scott v. Surman*, Willes, 400; *Ex parte Sayers*, 5 Ves. 169. But this rule was long since doubted, and is now completely overthrown. It was questioned by Lord Eldon, in *Lord Cheetworth v. Edwards*, 8 Ves. 46, where stock and money were, by the wrongful act of one in a fiduciary relation, confounded with his own; and Lord Eldon expressed the opinion that there was fair ground to say that the party having mixed them should not be permitted to dispose of them until he should have satisfactorily distinguished, by an answer in equity, that which in conscience he never ought to have mixed. And, acting on this view, an injunction was ordered accordingly; but a few days afterwards Lord Eldon varied the order by confining the injunction to the stock; observing that it would be too much to grant it as to the money at the bankers, as the last payment was made two years previously; and "it was too much to infer that it was the same money unconverted."

The matter is, however, now no longer one of doubt. In *Panton v. Panton*, in the Court of Exchequer (cited in *Lupton v. White*, 15 Ves. 435, 440), the defendant remitted considerable sums, the property of the plaintiff, with money of his own, to an agent in London, to be laid out; and the securities were changed for the purpose of misleading, and making it impossible for the plaintiff to distinguish his property, part being clearly property of the defendant. The court held, that, the confusion being occasioned by him who so dealt with the property, the distinction lay upon him; and if he could not distinguish what was his own, the whole must be considered as belonging to the other. The same principle was acted on in *Armory v. Delamirie*, 1 Str. 505, where a goldsmith improperly detained from a poor boy a diamond which the boy had found; and the court held, in an action of trover for the jewel, that as the defendant did not produce the jewel, and show it not to be of the finest water, the value of the best jewels was the measure of damages. The principle of these cases was applied by Lord Eldon, in *Lupton v. White*, 15 Ves. 432, with reference to the mixture of money by one in a fiduciary relation, in which it was held that an agent or bailiff, confounding his principal's money with his own, was to be charged with the whole, except what he could prove to be his own. In *Pennell v. Deffell*, 4 De G. M. & G. 372, Green, an

official assignee in bankruptcy, was, in that character and otherwise, a trustee for various persons and purposes, and as such paid various sums into a bank to his own credit, which were mixed with his own moneys. Various sums having been drawn by Green on different accounts, the Master of the Rolls held that the balance formed a part of his general personal estate. The Court of Appeal in Chancery reversed the decision. The principle governing such cases is so clearly and conclusively stated by Lord Justice Turner in his judgment, that we quote from it at considerable length, as the case must be considered one of the leading cases on the modern rule. He says: "The balance due to Green at the time of his death, on his account with the Bank of England, amounted to £1988 11s. 8d., and the balance due to him at the time of his death on his account with the London Joint Stock Bank, amounted to £2174 0s. 10d.; and these balances form the subject of the present contention. Inquiries having been directed by the decree upon the subject of these balances, the Master, by his report, found that the whole of the £1988 11s. 8d., the balance on the Bank of England account, and £2088 14s. 8d., part of the £2174 0s. 10d., the balance on the London Joint Stock account, belonged to the estates represented by Green as assignee or trustee; but this report having been excepted to, the Master of the Rolls, upon hearing the exceptions, decided that the whole of the £1988 11s. 8d., the balance of the Bank of England account, and the whole of the £2174 0s. 10d., the balance of the London Joint Stock account, belonged to and formed part of the general estate of Green. The conclusion at which the Master of the Rolls has arrived rests upon the ground that the moneys belonging to the estates represented by Green cannot be followed into the banking accounts; and the first question which we have to consider upon this appeal is, whether that conclusion is well founded.

"It is, I apprehend, an undoubted principle of this court, that, as between *cestui que trust* and trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust; and from this principle I do not understand the Master of the Rolls

ings of persons occupying those relations, by defining the exact limits of its exercise. The general doctrine, however, is that

to have in any degree dissented. Several cases illustrating the principle were cited in the argument; but perhaps it cannot be better illustrated than by referring to a case of familiar, almost daily, occurrence,—the case of trust-moneys employed in trade. An executor of a deceased partner continues his capital in the trade with the concurrence of the surviving partners, and carries on the trade with them. The very capital itself may consist only of the balance which at the death of the partner was due to him on the result of the partnership account. That capital may have no existence but in the stock-in-trade and debts of the partnership. The stock-in-trade and debts may undergo a continual course of change and fluctuation; and yet this court follows the trust capital throughout all its ramifications, and gives to the beneficiaries of the deceased partner's estate the fruits derived from that capital so continually altered and changed. We have here, I think, the most perfect instance of the extent to which the doctrine of following trust property has been carried by the court,—an instance, too, which exemplifies the difficulties with which the court has felt bound to grapple for the purpose of carrying out that doctrine; for nothing can be more difficult, nothing more inconvenient, than to follow out such a case to its results. But of course in those cases, as in other cases, the property which is the subject of the trust must in some manner be ascertained; and it is upon this point of the supposed impossibility of ascertaining what portion of the balances at the bankers' belonged to the trust, and what portion to the separate estate of Green, the judgment of the Master of the Rolls in this case has proceeded. These balances, it is said, are derived from two sources,—the trust estate and the private estate. How is it to be ascertained what portion of them is derived from one source, and what portion from the other? Is it, I would ask, more difficult to ascertain this than to ascertain what part of the profits of a partnership are to be attributed to the capital of a deceased partner, with the superadded difficulty, perhaps, of portions of that capital having been from time to time drawn out? It may be said that, in the case to which I have referred, the court has a substratum on which to proceed,—the ascertained amount of the deceased partner's share; but is there not equally a substratum in the case before us, in the amount of the trust-moneys paid into

the banking house? Again, it may be said, that in the case to which I have referred are rules and principles by which this court is guided in determining what belongs to the estates of deceased partners,—rules and principles which are not even yet, perhaps, clearly settled and defined. But before we part with this question upon that ground, we must inquire whether there are not also rules and principles by which this court may be guided in determining what, in such a case as the present, belongs to the trust estate. In order to test the question whether it be true that it cannot be ascertained what portion of the balances at the bankers' belonged to the trust estate, let us simplify the case. Suppose a trustee pays into a bank moneys belonging to his trust to an account not marked or distinguished as a trust account, and pays in no other moneys, could it be for one moment denied that the moneys standing to the account of the debt due from the bankers, arising from the moneys so paid in, would belong to the trust, and not to the private estate of the trustee? Then suppose the trustee subsequently pays in moneys of his own, not belonging to the trust, to the same account. Would the character of the moneys which he had before paid in, of the debt which had before accrued, be altered? Again, suppose the trustee, instead of subsequently paying moneys into the bank, draws out part of the trust-moneys which he has before paid in, would the remainder of those moneys, and of the debt contracted in respect of them, lose their trust character? Then, can the circumstance of the account, consisting of a continued series of money paid in and drawn out, alter the principle? It may, indeed, increase the difficulty of ascertaining what belongs to the trust; but I see no possible ground on which it can affect the principle. . . . With deference to the Master of the Rolls, I do not think that the case of *Massey v. Banner*, 1 Jac. & W. 241, on which he has mainly relied, supports the conclusion at which he has arrived. That case, as I understand it, establishes no more than this, that a trustee who pays in moneys to his own account at his banker's is liable to his *cestuis que trustent* for the moneys which he has so paid in, as he well may be. He has no right to mix the trust-moneys with his own, or to subject his *cestuis que trustent* to the difficulty of separating them. It is one thing, however, to say that the trustee is liable for moneys so paid in, and another

wherever two persons stand in such a relation, that, while it continues, confidence is necessarily reposed by one, and the influence

that the *cestuis que trust* are not entitled to the benefit of separating the trust moneys, if it be in their power to do so."

With all this which we have quoted we fully concur, as well as with all, to the same purport, in the judgment of Lord Justice Knight Bruce in the same case; and think that the judgment of Fry, J., on the point, in *Ex parte Dale & Co.*, 11 Ch. Div. 774, where he, in effect, held, contrary to the holding in *Pennell v. Deffell*, 4 De G. M. & G. 372, that where a bank stood in a fiduciary relation towards the claimants, though money which they had received under their special agency, if it had been kept separate from all the other moneys in the bank, or if it had been invested rightfully or wrongfully in some property into which the specific money could be traced, the money or the property into which the money had gone could be followed, but not if any mixture had taken place, is not on this latter point law, and was very properly, though very eustatically, condemned, and, in effect, overruled in *In re Hallett's Estate*, 13 Ch. Div. 696. See *Cheetworth v. Edwards*, 8 Ves. 46; *Lupton v. White*, 15 Ves. 432; *Pinkett v. Wright*, 2 Hare, 129; *Hirford v. Lloyd*, 20 Beav. 310; *Frith v. Cartland*, 2 H. & M. 417.

But when it is suggested in that case (*Pennell v. Deffell*, 4 De G. M. & G. 366) by Lord Justice Knight Bruce, and assented to and elaborated by Lord Justice Turner, that the rule in *Clayton's Case*, 1 Mer. 572, would apply to funds paid into a bank by a trustee, so that "checks drawn by the trustee in a general manner upon the bank would for every purpose be ascribed and affect the account," according to the rule in *Clayton's Case*, namely, that if the first item in the account were for trust moneys the first check paid out by the bank, "drawn by the trustee in a general manner upon the bank," though used by the trustee for his own purposes, would be treated as a payment of trust money, we think that an entirely unsound principle is stated; that it is contrary to the whole general reasoning of both Lord Justice Knight Bruce and Lord Justice Turner themselves, and is really inconsistent, as shown in *Frith v. Cartland*, 2 H. & M. 417, 420 *et seq.* with the actual decision in *Pennell v. Deffell*, 4 De G. M. & G. 366, itself.

We think the law is correctly stated in *Frith v. Cartland*, in referring to *Pennell v. Deffell*, thus: "The guiding principle is that a trustee cannot assert a title of

his own to trust property. If he destroys a trust fund by dissipating it altogether, there remains nothing to be the subject of a trust; but so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust. A second principle is that if a man mixes trust funds with his own the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own." And to show how completely the reasoning and holding in *Pennell v. Deffell* are in accord with this correct statement of the law, and against the *obiter dicta* in the case, of the application of the rule in *Clayton's Case* to trustees or parties in a fiduciary relation, we quote further from *Frith v. Cartland*, 2 H. & M. at p. 421 *et seq.*: "Upon these two principles the case of *Pennell v. Deffell* was decided, and it illustrates very strongly the manner in which the court will follow trust property. The sole question in every case is whether the property can or cannot be identified. In the present case the evidence amounts to this: The bankrupt took £2,500 of bills belonging to the plaintiffs, and discounted them together with bills of his own. He received a check for £3,500, besides a further sum which was paid to his credit at the Bank of England. These dealings, and the conversion of the proceeds into credits on foreign banks, raise the same kind of case as was suggested by the Lord Justice Knight Bruce in his judgment in *Pennell v. Deffell*. If a man has £1,000 of his own in a box on one side, and £1,000 of trust property in the same box on the other side, and then takes out £500 and applies it for his own purposes, the court will not allow him to say that the money was taken from the trust fund. *The trust must have its £1,000 so long as a sufficient sum remains in the box.* So here Edwards could be not allowed to say that the £284 deposited in the Bank of England was his own, and that the trust portion of the fund was that which he took abroad with him, and from which he drew as he required for his own purposes. There is, therefore, no difficulty in treating that sum at the bank as belonging to the trust, together with what remains of the sum which he took abroad. It appears that Edwards (the fiduciary), after passing the property through various transformations, had at last a sum nearly sufficient, together with the money at the bank, to cover the amount of the plaintiff's trust fund. During the interval he had spent

which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to

something out of the mixed fund, which expenditure must be attributed to that portion which I may call his own. Unless, therefore, the bankruptcy makes a difference, there can be no ground for denying the plaintiff's title to the fund recovered, or for dividing it *pro rata*. The court attributes the ownership of the trust property to the *cestui que trust* so long as it can be traced. Here there is no difficulty in identifying it. Throughout the whole series of transformations the bankrupt always held a fund available to meet the claim of the trust. In *Pennell v. Deffell* part of the trust fund had been paid into a bank, *but it was not marked, and was wiped out by subsequent drawings*, and the whole ultimate balance could not be fixed with the trust any more than a second £1,000 of stock which a trustee might happen to acquire after selling £1,000 of trust stock and spending the proceeds. *So long, however, as the fund can be traced the trustee cannot assert his own title to it.*"

And although, as above intimated, the "ultimate balance" in *Pennell v. Deffell*, 4 De G. M. & G. 372, was fixed with the trust, and although the whole general reasoning of both Knight Bruce and Turner, Lord Justices, was exactly in accordance with the actual general holding in that case, and in *Frith v. Cartland*, 2 H. & M. 418, yet while deciding, under the facts of the case, that "when a trustee pays trust moneys into a bank to his credit to a simple account with himself, not distinguished in any other manner, the debt thus constituted from the bank to him is one which belongs as specifically to the trust as the money would have done had it specifically been placed by the trustee in a particular repository and so remained; and the case would not be varied by the circumstance of the bank holding also for the trustee, or owing also to him money in every sense his own;" they expressed the opinion that "checks drawn by the trustee in a general manner upon the bank would for every purpose be ascribed and affect the account in the mode explained and laid down in *Clayton's Case*, 1 Mer. 572," they involved themselves in a very palpable contradiction, and greatly lessened the value of two otherwise clear and able judgments.

The whole general reasoning of both the judges in *Pennell v. Deffell* is so utterly opposed to the idea of the rule in *Clayton's Case* being applicable to the case of a trustee or fiduciary, that it seemed almost impossible to believe that they meant

what they say; and it was not until we found our judgment on the point fortified by the reference to the case in *Frith v. Cartland*, 2 H. & M. 418, and the wrong principle stated by them in judgments otherwise well-reasoned, condemned in *In re Hallett's Case*, 13 Ch. Div. at p. 729, that we could satisfy ourselves that we had not in an inexplicable manner misapprehended the meaning of their statements on the point, which seemed so utterly unsound, and so contrary to their actual general holding and to the general tenor of their judgments.

The whole question is most elaborately examined in *In re Hallett's Estate*, 13 Ch. Div. 696-753, where it was held that if a person who holds money as a trustee or in a fiduciary character pays it to his account at his bankers, and mixes it with his own money, and afterwards draws out sums by checks in the ordinary manner, the rule in *Clayton's Case*, 1 Mer. 572, attributing the first drawings out to the first payments in, does not apply; and that the drawer must be taken to have drawn out his own money in preference to the trust money. Jessel, M. R., in so deciding, thus deals with *Pennell v. Deffell*, 4 De G. M. & G. 372, after referring to the application in that case of the rule in *Clayton's Case* to a trifling portion of the trust estate: "But that was not the whole case of *Pennell v. Deffell*. The main part of *Pennell v. Deffell* was giving effect to the right of *cestuis que trust* in the case of blended moneys, and upon the very principle which I have explained, and which, if I may say so, was so clearly explained by Mr. Justice Fry in his judgment. If, therefore, we are to ascertain the principle on which *Pennell v. Deffell* is decided we must look at the whole of the judgment, and not at one part of it only. That being so, I have come to this conclusion, that the principle is rightly laid down, and it is rightly applied throughout the judgment *except as to this portion*, and that as to this portion there has been a *mistake*, not in the principle, but in the application of the principle. Therefore, if I am to be guided by the principle as laid down, I think the principle must prevail without regard to a mere slip in its application." The "principle" here referred to is that if money held by a person in a fiduciary character has been paid by him to his account at the banker's the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands. See also the opinion of Fry, J., as above approved of by Jessel, M. R., in

obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to

Ex parte Dale, 11 Ch. Div. at p. 778, where he states the general logical result of *Pennell v. Deffell* to be a decision that as between *cestui que trust* and trustee the mixing of the fund is immaterial "so long as there is a fund on which the *cestui que trust* can lay his hands," and that, with reference to this, it makes no difference that instead of trustee and *cestui que trust* it is a case of fiduciary relationship; affecting, therefore, all such cases of sales where the question would arise in connection with funds in the hands of agents or factors or other fiduciaries. See *City Discount Co. v. McLean*, L. R. 9 C. P. 692, 701, where the rule in *Clayton's Case*, 1 Mer. 530, was held inapplicable, and was not acted on. See also *Henniker v. Wigg*, 4 Q. B. 492; *Ex parte* Cooke, 4 Ch. Div. 123; *Middleton v. Pollock*, *Id.* 49; *Birt v. Burt*, 11 Ch. Div. 773, n.; *Pinkett v. Wright*, 2 Hare, 120; *Ex parte* Kelly & Co., 11 Ch. Div. 306. And see counsel's opinion of the contradictory holding in *Pennell v. Deffell*, 4 De G. M. & G. 372, 384; *In re* Hallett's Estate, 13 Ch. Div. 725, *arguendo*.

In this country it has been held, in accordance with the well-decided English decisions cited in this note, that if a party having charge of the property of others, so confounds it with his own, that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon the party who produces it, and it is for him to distinguish his own property or lose it. If it is a case of damages, damages are given to the utmost value that the article will bear. *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 103; *Armory v. Dalamire*, 1 Str. 505; *Lupton v. White*, 15 Ves. 432; *The Attorney-General v. Fullerton*, 2 Ves. & B. 264. If the goods can be easily distinguished, and separated, then no change of property takes place, and each party may lay claim to his own. If the goods are of the same nature and value, although not capable of an actual separation by identifying each particular, yet, if a division can be made of equal value (as in the case of a mixture of corn, or coffee, or tea, or wine, of the same kind and quality), there each may claim his aliquot part. But if the mixture is undistinguishable, and a new ingredient is formed, not capable of a just appreciation and division, according to the original rights of each, the party who causes the wrongful mixture must bear the whole loss. See *Bond v. Ward*, 7 Mass. 123.

And it has been frequently held that the confusion or mixture of the trust es-

tate with the trustee's own property presents no obstacle in the way of separating the former from the mass, and dealing with it as trust estate. And into whatsoever character of goods, securities, or property a trust fund may be converted, it is still impressed with the trust. *Morrison v. Kinstrae*, 55 Miss. 76; *Thompson v. Perkins*, 3 Mason, 232; *Overseers of Poor v. Bank of Virginia*, 2 Gratt. 544; *National Bank v. King*, 57 Pa. 202; *Cook v. Tullis*, 18 Wall. 332; *Price v. Ralston*, 2 Dall. 60; *Goodenow v. Tyler*, 7 Mass. 36; *Stair v. The York National Bank*, 55 Pa. 364; *Frazier v. The Erie Bank*, 8 W. & S. 13. In *National Bank v. King*, 57 Pa. 203, there is a reference to *Pennell v. Deffell*, 4 De G. M. & G. 383, to the effect that it is to be noticed in that case that the moneys of several distinct trusts were carried into the account, and that the trustee's own money had been mixed with them. The court continued: "But it is insisted there was no ear-mark to the money. What of that, if the money can be followed, or if it can be traced into a substitute? This is often done through the aid of an ear-mark. But this is only an index enabling a beneficial owner to follow his property. It is no evidence of ownership. An ear-mark is not indispensable to enable a real owner to assert his right to property, or to its product or substitute. Evidence of substantial identity may be attached to the thing itself, or it may be extraneous."

But there are some cases in this country which follow the old exploded English doctrine, that the trust property cannot be followed where it has been turned into money, and mixed with other money, "because money has no ear-mark." *Per* Lord King, in *Deg v. Deg*, 2 P. Wms. 414. There is a case to this effect in *Pennsylvania*, — *Thompson's Appeal*, 22 Pa. St. 16, which is decided on the authority of *Story's Equity*, § 1259, which cites and relies on the old case to which we have referred in this note, of *Ryall v. Rolle*, 1 Atk. 172. *Story* also cites a later case, that of *Leigh v. Macaulay*, 1 Y. & C. 260, for the position, but the case is very far from sustaining it. The defence in this case was (p. 263) "that the moneys received by the defendants on account of *Leigh's* estate had not been invested by them for the benefit of that estate, but had been mixed with their own moneys, and applied to their own uses;" and (p. 264) "the defendants admitted that they never accounted for any part of this balance, but that they paid it

retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.

This doctrine was applied in *Tate v. Williamson*,¹ under the following facts: T., a young man aged twenty-three, entitled to a moiety of an estate, the entirety of which brought in about £440 a year, being pressed for payment of his college debts, amounting to about £1000, and being estranged from his father, wrote to his great-uncle for advice and assistance as to payment of the debts. The uncle deputed the defendant, his nephew, to see T. on the subject. The defendant met T. by appointment, and at this interview T. refused to allow any attempt to compromise the debts, and said he would sell his moiety of the estate, upon which the defendant offered him £7000 for it, payable by instalments. T., next day, accepted the offer. Before an agreement had been signed, the defendant obtained a valuation by a surveyor, estimating the value of the mines under the entirety at £20,000. The sale was completed without this valuation having ever been communicated to T. T.'s heir filed a bill to impeach the sale. It was held by the Court of Appeal, affirming the decree of Wood, V. C., that the defendant had stood in a fiduciary relation to T., which made it his duty to communicate to T. all material information which he acquired affecting the value of the property, and that, as he had not communicated the valuation to T., the transaction must be set aside.²

to their own bankers on their own account, and mixed it with their own money." But the court held that the money must be paid into court, on the principle that when a court of equity traces out trust-money in the hands of a person who has not *prima facie* a right to hold it, that money must be brought into court. There is also a case in California, which is decided on the authority of the Pennsylvania case; *Lathrop v. Bampton*, 31 Cal. 17.

See a very strong case, *Bogle v. Stewart*, Dom. Proc. 1801, cited in *Leigh v. Macaulay*, 1 Y. & C. 265, where trust-money paid over to bankers, and not placed in a separate account, and paid out by them, was ordered to be paid over to the *cestuis que trust* by the bankers; they having received the money under circumstances from which a knowledge by them of the trust was implied. But, where bankers have no notice displacing their equity, if the bankers have any account with the fiduciary by way of set-off, that set-off would equally affect the money paid in to his own account, though being the money of his principal, as it would the agent's own money. *Massey v. Banner*, 1 Jac. & W. 248.

¹ L. R. 2 Ch. Ap. 55.

² The principle is laid down in *Billage v. Southee*, 9 Hare, 534, upon which the court acts in such cases. There the case was that a medical attendant had taken from a poor patient a promissory note for an amount beyond what was due to him, upon the most extraordinary scale of charges, and this at a time when the patient's position in life was to be changed. Sir James Turner, in delivering judgment, said: "I am of opinion a court of equity will not permit this. No part of the jurisdiction of the court is more useful than that which it exercises in watching and controlling transactions between persons standing in a relation of confidence to each other; and in my opinion this part of the jurisdiction of the court cannot be too freely applied, either as to the persons between whom, or the circumstances in which it is applied. The jurisdiction is founded on the principle of correcting abuses of confidence, and I shall have no hesitation in saying it ought to be applied, whatever may be the nature of the confidence reposed, or the relation of the parties between whom it has subsisted. I take the principle to be one of universal

*Michoud v. Girod*¹ was a case where third parties bought for executors the whole estate of the testator, which was bid in in the

application, and the cases in which the jurisdiction has been exercised, those of trustees and *cestui que trust*, guardian and ward, attorney and client, surgeon and patient, to be merely instances of the application of the principle. In this case there can be no doubt that a relation of confidence subsisted, and there can be equally little doubt that advantage has been taken of that confidence. Why was the amount of the debt which was due from the poor man to be altered, because his position in life was about to be changed? And why was the alteration to be made without any account being rendered, or any explanation being offered? It is said that he intended to be liberal, and that this court would not prevent him from being so; and no doubt it would not if such were his intention; but intention imports knowledge, and liberality imports the absence of influence; and I see no evidence in this case either of knowledge or of the absence of influence; and where a gift is set up between parties standing in a confidential relation, the *onus* of establishing it by proof rests upon the party who has received the gift." *Dent v. Bennett*, 7 Sim. 539; 4 My. & C. 269; *Popham v. Brooke*, 5 Russ. 8; *Gibson v. Russell*, 2 Y. & C. Ch. 104. As between a solicitor and his client the rule is, not that there is an actual incapacity to purchase from the client: *Montesquieu v. Sandys*, 18 Ves. 302; *Champion v. Rigby*, 1 R. & Myl. 539; *Kingsland v. Barnewell*, 4 Bro. P. C. 154; *Cave v. Lord Allen*, 2 Dowl. 294; but, that, inasmuch as the parties stand in a relation which gives, or may give, the solicitor an advantage over the client, the *onus* lies on the solicitor to prove that the transaction was fair. *Gibson v. Jeyes*, 6 Ves. 266; *Hatch v. Hatch*, 9 Ves. 292; *Wood v. Donnes*, 18 Ves. 120; *Bellew v. Russell*, 1 Bull & B. 104; *Welles v. Middleton*, 1 Cox, 112; s. c. cited 18 Ves. 127; *Hunter v. Atkins*, 3 Myl. & K. 135, *per* Lord Brougham; *Jones v. Thomas*, 2 Y. & C. 498. In *Gibson v. Jeyes*, 6 Ves. 278, Lord Eldon says that an attorney may contract with his client, but that he should say, "if he was to deal with her for this, she must get another attorney to advise her as to the value; or, if she would not, then out of that state of circumstances this clear duty results from the rules of this court, and throws upon him the whole *onus* of the case; that, if he will mix with the character of attorney

that of vendor, he shall, if the propriety of the contract comes in question, manifest that he has given her all that reasonable advice against himself, that he would have given her against a third person. It is asked, where is that rule to be found? I answer, in that great rule of the court, that he who bargains in matter of advantage with a person placing confidence in him is bound to show that a reasonable use has been made of that confidence; a rule applying to trustees, attorneys, or any one else." An attorney is not incapable of contracting with his client. He may for a horse, an estate, etc. A trustee may also deal with his *cestui que trust*; but the relation must be either dissolved, or the parties must be put so much at arm's length, that they agree to take the character of purchaser and vendor; and you must examine whether all the duties of those characters have been performed. *Gibson v. Jeyes*, 6 Ves. 277. This was not denied in *Fox v. Macreth*, 2 Bro. Ch. 400, a leading case on the question. See *Rossiter v. Walsh*, 4 Dr. & W. 485, where a lease of premises from an agent to his sub-agent was set aside. In *Moloney v. Kernan*, 2 Dr. & W. 31, it was held that an agent may take a lease from his principal, but he must always be prepared to prove that full information has been imparted to his principal, and that the contract has been entered into with perfect good faith. And a party who takes an assignment of a lease from the agent of the lessor, with notice of the assignor's character as agent, has the same liability of sustaining the lease cast upon him that the agent has, and if the lease cannot be upheld by the agent, neither can it be supported by the purchaser from the agent. *Ibid.* See the celebrated case of *Lord Selsey v. Rhoades*, 2 Sim. & St. 41; 1 Bligh, N. R. 1, where such a transaction was sustained, the whole transaction having been considered by the court below as having been done in good faith and with full knowledge by the principal, and the judgment having been sustained in the House of Lords on the ground of delay and acquiescence. See further, *Murphy v. O'Shea*, 2 J. & Lat. 422; *Turner v. Harvey*, Jac. 169; *Reynell v. Sprye*, 1 De G. M. & G. 660; *Hugenin v. Baseley*, 14 Ves. 273, 300; *Harrison v. Guest*, 6 De G. M. & G. 424; 8 H. L. Cas. 481; *Chambers v. Betty*, Beat. 488; *Farnam v. Brooks*, 9 Pick. 212; *Williams v. Powell*, 1 Ired. Eq. 460; *Rose v. Mynott*, 7 Yerg. 30;

¹ 4 How. 503.

name of the third parties, and by them conveyed to the executors. Proceedings having been taken to set aside the purchase of the executors, the executors denied any fraud in fact or in intention on their part, and declared that the sales were judicially ordered and conducted; that the purchases were rightfully made, for a fair price, at public auction, and that the plaintiffs were barred by long silence, laches, acquiescence, and lapse of time; and that two of the complainants had given the executors receipts and acquittances which were valid and obligatory. The Circuit Court for Eastern Louisiana set aside the purchase, and the United States Supreme Court affirmed that decision, laying down and adopting, from *Davoue v. Fanning*,¹ the following doctrine, which accords with the mass of the English and American decisions on the subject: "If a trustee or person acting for others sells the trust estate, and becomes himself interested in the purchase, the *cestuis que trust* are entitled, as of course, to have the purchase set aside, and the property re-exposed to sale, under the direction of the court. And it makes no difference in the application of the rule, that a sale was at public auction, *bonâ fide*, and for a fair price, and that the executor did not purchase for himself, but that a third person, by previous arrangement with the executor, became the purchaser, to hold in trust for the separate use and benefit of the wife of the executor, who was one of the *cestuis que trust*, and who had an interest in the land under the will of the testator. The inquiry, in such a case, is not whether there was or was not fraud in fact."² The case was also examined with reference to the

Berrien v. McLane, 1 Hoff. Ch. 421; *Wheelan v. Wheelan*, 3 Cow. 537; *Starr v. Vanderheyden*, 9 Johns. 253; *Mills v. Ervin*, 1 McCord, Ch. 524; *Copeland v. Merc. Ins. Co.*, 6 Pick. 196; *Reed v. Warner*, 5 Paige, 650; *Beal v. McKiernan*, 6 Mill. La. 407; *Bartholomew v. Leach*, 7 Watts, 472; *Prevost v. Gratz*, 1 Pet. C. C. 364; *Davoue v. Fanning*, 2 Johns. Ch. 351; *Green v. Winter*, 1 Johns. Ch. 27; *Church v. Mar. Ins. Co.*, 1 Mas. 341; *Barker v. Marine Ins. Co.*, 2 Mas. 369; *Parkist v. Alexander*, 1 Johns. Ch. 394; *Butler v. Haskell*, 4 Dess. 651; *Moseley v. Buck*, 3 Munf. 232.

¹ 2 Johns. Ch. 252.

² The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private; but the value of the prohibition is most felt, and its application is more frequent, in the private relations in which the vendor and purchaser may stand towards each other. The disability

to purchase is a consequence of that relation between them, which imposes on the one a duty to protect the interest of the other, from the faithful discharge of which duty his own personal interest may withdraw him. In this conflict of interest, the law wisely interposes. It acts not on the possibility that, in some cases, the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty. It therefore prohibits a party from purchasing on his own account that which his duty or trust requires him to sell on account of another, and from purchasing on account of another that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is the seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells. *Michoud v. Girod*, 4 How. at p. 555. No rule is

questions of laches and acquittance, and these, under the rules relating to purchases by parties occupying a fiduciary position, did not prevail.¹

better settled than that a trustee cannot become a purchaser of the trust estate. He cannot be at once vendor and vendee. He cannot represent in himself two opposite and conflicting interests. As vendor he must always desire to sell as high, and as purchaser to buy as low, as possible; and the law has wisely prohibited any person from assuming such dangerous and incompatible characters. *Wormley v. Wormley*, 8 Wheat. 421, 441. *Davoue v. Fanning*, 3 Johns. Ch. 252, where Chancellor Kent delivers an elaborate judgment, is the leading case on the question in this country. The principle is there laid down as quoted by the court in *Michoud v. Girod*, *supra*, and it is then said, — “The earliest case I have met with, containing any full recognition of the principle that a trustee cannot act for his own benefit on a subject connected with the trust, is that of *Holt v. Holt*, in the 22 Car. 2, 1 Ch. Cas. 190, where it was held by the Lord Keeper Bridgman, assisted by the judges, that if an executor in trust renewed a lease, it should be for the benefit of the *cestui que trust*. The next case that occurs was that of *Keech v. Sandford*, before Lord Chancellor King, in 1726. 3 Eq. Cas. Ab. 751. A lease of the profits of the market was devised to a trustee, in trust for an infant; before the expiration of the term the trustee applied to the lessor for a renewal for the infant's benefit, which he refused, because he could not distrain, but must rest singly on covenant, which the infant could not make. The trustee then took a lease to himself, and the chancellor decreed that the lease should be assigned to the infant, and that the trustee should be indemnified from the covenants in the lease, and the trustee account for the profits since the renewal. He said he must consider it a trust for the infant, ‘for if the trustee, on refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestui que trusts*; and though it might seem hard that the trustee was the only person of all mankind who might not have the lease, yet it was very proper that the rule should be strictly pursued, and not in the least relaxed, for it was very obvious what would be the consequence of letting trustees have the lease on refusal to renew to *cestui que trusts*.’ If we go through all the cases, I doubt whether we shall find the rule and the policy of it laid down with more clearness, strictness, and good sense.” See further, *Harrod v. Norris's Heirs*, 11 Martin, 298; *Lonbottom's Ex'r v. Babcock*, 9 La. 48; *Scott's Ex'rs v.*

Gorton, 14 La. 114, 122; *McCluskey v. Webb*, 4 Rob. 201; *Prevost v. Gratz*, 1 Pet. C. C. 368; *Wormley v. Wormley*, 8 Wheat. 421; *Case v. Abeel*, 1 Paige, 497; *Rogers v. Rogers*, 1 Hopk. 525; *Fox v. Macrath*, 2 Bro. Ch. 400; *Hall v. Noyes*, 3 Bro. Ch. 483; *Kellick v. Flexny*, 4 Bro. Ch. 161; *Whiteote v. Lawrence*, 3 Ves. 740; *Campbell v. Walker*, 5 Ves. 678. As to purchases by agents, see *York Buildings Co. v. Mackenzie*, 8 Bro. P. C. 42; *Lowther v. Lowther*, 13 Ves. 95; *Watt v. Grove*, 2 Sch. & Lef. 492; *Whitcomb v. Minchin*, 5 Madd. 91; *Woodhouse v. Meredith*, 1 Jac. & W. 204. And see *Ex parte Hughes*, 6 Ves. 617; *Coles v. Trecothick*, 9 Ves. 234; *Oliver v. Cant*, 8 Price, 127; *Ex parte Reynolds*, 5 Ves. 707; *Ex parte James*, 8 Ves. 337; *Ex parte Bennett*, 10 Ves. 381; *Ex parte Morgan*, 12 Ves. 6; *Ex parte Spong*, 1 Rose, 133, as to purchase by auctioneers, commissioners, etc.

¹ As long as the dependence of the *cestui que trust* upon the trustee, and the fiduciary relations continue, an alleged ratification will always be scrutinized with the utmost jealousy; and a party possessing only imperfect information cannot be held guilty of laches. *Butler v. Haskell*, 4 Dess. 651-717 (where a full examination of the cases will be found); *Murray v. Palmer*, 2 Sch. & L. 486; *Purcell v. McNamara*, 14 Ves. 107, 120; *Cole v. Gibbons*, 3 P. Wms. 293; *Brooke v. Gally*, 2 Atk. 34; *Cole v. Gibson*, 1 Ves. Sen. 507; *Taylor v. Rockfort*, 2 Ves. Sen. 281; *Roche v. O'Brien*, 1 Ball & B. 230; *Morse v. Royall*, 12 Ves. 364; *Wood v. Downes*, 18 Ves. 120; *Ryder v. Bickerton*, 3 Swan. 81; *Bowes v. London Water Works*, 3 Madd. 375. As to acquiescence, see *Walker v. Symonds*, 3 Swan. 61; *Broadhurst v. Balguy*, 1 Y. & C. Ch. 16; *Clifton v. Cockburn*, 3 Myl. & K. 76; *Clark v. Perrier*, 2 Freem. 48; *Phillipson v. Gatty*, 7 Hare, 516; 2 H. & Tw. 459; *Ex parte Smith*, 2 M. D. & De G. 113; *Munch v. Cockerell*, 5 Myl. & C. 179; *Byass v. Gates*, 2 W. R. 487; *Hawkins v. Gardner*, 2 Sm. & G. 441; *Brewer v. Swirles*, 18 Jur. 1069; *Burrows v. Walls*, 5 De G. M. & G. 233; *Bate v. Hooper*, 5 De G. M. & G. 338; *Lockhart v. Reilly*, 25 L. J. Ch. 697; *Farrar v. Barraclough*, 2 Sm. & G. 231. A *cestui que trust* is not bound by acquiescence, unless fully informed of his rights, and of all the material facts and circumstances of the case. And although the onus lies upon a party relying upon acquiescence to prove the facts upon which the consent of the *cestui que trust* is to be in-

Where the plaintiff, a single woman, was informed by her brother's agent, that on her brother's death she had succeeded to a small estate, of which she knew nothing, and, on the agent's representations of its value, which were inaccurate, and without legal advice, she conveyed the estate for an inadequate sum to the agent's daughter, the court, while holding that there was no such relation between the parties as to incapacitate the agent from purchasing *bonâ fide*, set the deed aside on the ground that the agent's statement was not a mere purchaser's assessment, but a deliberate false statement made to the plaintiff by a person having full knowledge; which statement was asked by her for her guidance in the transaction, and was acted on by her in reliance on its good faith and accuracy.¹

A sale of bonds was made in 1867, at public auction, by the attorney of the plaintiff, and bought by the attorney at their full value at the time. The plaintiff took no steps to set aside the purchase at the time, which was voidable at his election; but, after having adopted and approved of the transaction, which was entirely clear of any fraudulent features, the court held that the plaintiff, after lying by for twelve years, was guilty of laches, and that, having shown no impediments in his way preventing an earlier prosecution of his suit, he could not then, on the bonds having reached a higher value, maintain an action which, but for his approval and long acquiescence in the purchase, he could have sustained.²

ferred, there may be cases in which, from great length of time, such facts would be presumed. *Life Assoc. of Scotland v. Siddall*, 3 De G. F. & J. 58. See *Griffiths v. Porter*, 25 Beav. 236; *Cope v. Clark*, 18 W. R. 279; *Bright v. Legerton*, 29 Beav. 60; *Raby v. Ridehalgh*, 7 De G. M. & G. 104.

¹ *Haygarth v. Wearing*, L. R. 12 Eq. 320. Inadequacy of consideration, under such circumstances, is a material element, as going to show fraud in one in a *quasi* fiduciary relation. See *Cooke v. Lamotte*, 15 Beav. 234; *Carpmael v. Powis*, 10 Beav. 36; *Evans v. Llewellyn*, 2 Bro. Ch. 150. See *Turner v. Harvey*, Jac. 169, 178; *Rawlins v. Wickham*, 3 De G. & J. 304, as to the effect of such misrepresentations when made by even an entire stranger.

² *Marsh v. Whitmore*, 21 Wall. 178. The court say: "The question is whether, after this long acquiescence in the acts of the defendant, with knowledge of the transaction, the complainant can call upon him to account for the present value of the bonds purchased by him. Most undoubtedly that sale was voidable. The character of vendor and purchaser cannot

be held by the same person. They impose different obligations. Their union in the same person would at once raise a conflict between interest and duty; and, constituted as humanity is, in the majority of cases duty would be overborne in the struggle. The law, therefore, wisely prohibits a party selling on another's account from becoming a buyer on his own at the sale, and will always condemn transactions of that character whenever their enforcement is attempted. The defendant could have treated the purchase made by the defendant as a nullity. He could have insisted that the relation of the defendant to the property was not changed by the proceeding, and that he stood charged with the same trust respecting it with which he was charged previously. And were there nothing more in the case than the fact of the sale and purchase, the complainant would be entitled to call the defendant to account for the full value of the bonds. But unfortunately for him there is more in the case. He has adopted and approved of the transaction. His declaration to the defendant at Augusta the year following the sale is

Van Pelt, not wishing to be known in the transaction, had a steamboat purchased in the name of Vanderbilt, Van Pelt supplying the funds. After the death of Van Pelt, the steamboat was purchased by the appellants, innocent third parties, for full value. The Supreme Court of the United States held, reversing the judgment of the Circuit Court for Maine, that the title passed to the purchasers, for although, as between Vanderbilt and the representative of his principal, the legal title would not avail; as respects third persons who had bought in good faith for a valuable consideration, the equity of the case turns against the party who has enabled his agent or any other person to hold himself forth to the world as having not only the possession, but the usual documentary evidence of property in the article.¹

Where a bill was filed to set aside a sale of property, belonging to infant tenants in common, made under order of court, upon the ground that there was constructive fraud by the purchasers, the Supreme Court of the United States held that, though some of

evidence tending to that effect, and considered in connection with his long acquiescence in the transaction, must be deemed conclusive. Had he at once denied the validity of the transaction, or by any declaration or proceeding indicated dissatisfaction with it, or even refrained from expressions of approval, he would have stood in a court of equity in a very different position. There is no doubt that the prices bid at the sale were all that the bonds were then worth, and there is no reason for imputing intentional fraud to the defendant. Under these circumstances he may very well have been justified in assuming, and in acting upon the assumption, that the complainant was satisfied with his proceedings." *Ibid.* at p. 183 *et seq.* In *Badger v. Badger*, 2 Wall. 87, 94, the court state the principles governing such cases, as follows: "In such cases courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there have been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment, caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the Chancellor. The party who makes such appeal should set forth in his bill specifically what were the impediments to an early prosecution of his claim; how

he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the Chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer." And see the authorities cited in the previous note.

¹ *The Calais Steamboat Co. v. Scudder*, 2 Black, 372. As to the necessity of inquiry in such case, see *Jones v. Smith*, 1 Phil. 244; *Hiern v. Mill*, 13 Ves. 114, 120; *Jackson v. Rome*, 2 S. & St. 472, 475; *Whilbroad v. Jordan*, 1 B. & C. 303; *Kennedy v. Green*, 3 M. & K. 699, 713; *Ferrars v. Cherry*, 2 Vern. 384; *Miles v. Langley*, 1 R. & M. 39; *Plumb v. Fluitt*, 2 Anstr. 432; *Evans v. Bicknell*, 6 Ves. 174; *Cothay v. Sydenham*, 2 Bro. Ch. 391. And see *Dyer v. Pearson*, 3 B. & C. 38; *Mowrey v. Walsh*, 8 Cow. 238, as to purchases by innocent parties from parties fraudulently obtaining title. See also *Horwood v. Smith*, 2 T. R. 750; *Parker v. Patrick*, 5 T. R. 175; *Wheelwright v. Depeyster*, 1 Johns. 471; *McCarty v. Vickery*, 12 Johns. 348. *Jackson v. Walsh*, 14 Johns. 407, 415, *per* Thompson, C. J.: "It has been a long and well-settled principle that a purchaser for a valuable consideration without notice has a good title, though he purchase of one who has obtained the conveyance by fraud." See *Jackson v. Henry*, 10 Johns. 185, 197.

the defendants who stood in fiduciary relations with the infants appeared to have become interested in the property, it was not until after those relations had ceased; and that, therefore, the bill could not be sustained.¹

The assignee of bankrupts sold tug-boats, dredges, and other personal property to H.; which sale was confirmed by the court. H. not paying for the property, the court made an *ex parte* order setting aside the sale to H., and directing that the property be sold to the defendants, which was done; they paying the purchase-money. The sale to the defendants was subsequently cancelled by the court, and the original sale to H. was carried out. H. and his principal, C., filed a bill to compel the defendants to account for the profits from the use of the property while in their possession, on the ground that they were constructive trustees for the plaintiffs. The Supreme Court, reversing the decision of the Circuit Court, held, that the defendants, having purchased the property under a judicial sale,—receiving the property from the hands of the court,—did not occupy any fiduciary relation with the plaintiffs, with whom there was no privity of contract, and against whom they held the property adversely and without any liability to account for the profits; and directed that the bill be dismissed.²

Where one, whose duty it was as the agent of his principal to pay taxes on his principal's property to prevent its sale, in violation of his duty permitted the property to be sold, and himself became the purchaser, the Supreme Court of the United States declared that there was nothing in law or morality plainer than that the purchase must be held to be in trust for the benefit of the principal, on his re-payment of the sum advanced by his agent.³

¹ Kearney v. Taylor, 15 How. 494.

² Conro v. Crane, 110 U. S. 403. See Raun v. Reynolds, 15 Cal. 460; Reynolds v. Harris, 14 Cal. 667; Lupton v. Almy, 4 Wis. 242.

³ Rothwell v. Dewes, 2 Black, 613; *Ex parte* James, 8 Ves. 337. In this latter case, Lord Eldon said: "The doctrine as to purchases by trustees, assignees [*i. e.*, in bankruptcy], and persons having a confidential character, stands much more upon general principle than upon the circumstances of any individual case. It rests upon this,—that the purchase is not permitted in any case, however honest the circumstances, the general interests of justice requiring it to be destroyed in every instance; as no court is equal to the examination and ascertainment of the truth in much the greater number of cases. The principle has been carried so high that where a trustee in a renewable lease endeavored fairly and honestly to treat

for a renewal on account of the *cestui que trust*, and the lessor positively refusing to grant a renewal for his benefit, the trustee, as he very honestly might under those circumstances, took the lease for himself, it was held, that even in such a case it is so difficult to be sure there was not management,—a difficulty that might exist in a much greater degree in many other cases having the same aspect,—that the lease, taken by the trustee from a person who would not renew for the benefit of the *cestui que trust*, should be considered taken for his benefit; and should be destroyed rather than that the trustee should hold it himself under those circumstances. The principle as to trustees is certainly stated very differently in different authorities. It is not, in my opinion, that it must be shown that the trustee has made an advantage, as it is stated in some of them. The case I put of the infant as to the lease negatives that. The principle

Unless restrained by statute, an executor can dispose of the personal assets of his testator, by sale or pledge, for all purposes

is, that, as the trustee is bound by his duty to acquire all the knowledge possible, to enable him to sell to the utmost advantage for the *cestui que trust*, the question, what knowledge he has obtained, and whether he has fairly given the benefit of that knowledge to the *cestui que trust*, which he always acquires at the expense of the *cestui que trust*, no court can discuss with competent sufficiency or safety to the parties." *Ex parte James*, 8 Ves. 337, 345, 348. It was therefore, on the application of these principles, held in this case that the purchase at public auction of a bankrupt's estate by the solicitor to the commission at a price much beyond its appraised value, and at a much higher price than it would have realized if he had not bidden on it, should, on the application of the bankrupt's representative, be set aside, the Lord Chancellor refusing to allow the solicitor, discharging himself from his character as such, to bid upon the re-sale of the estate, without the previous consent of the parties interested, freely given, upon full information. It was further held that the purchase of dividends by the assignee and solicitor, under a commission of bankruptcy, could not be for their own benefit, and that, to set aside a purchase by a trustee of the trust property, it is not necessary to show that he has made any advantage. As to the purchase of the dividends by the solicitor, Lord Eldon said: "As to the dividends, it is not contended that an assignee can buy dividends. It goes upon the old principle that an executor cannot buy the debts due from the testator. First, the possession of the property gives him the opportunity of dealing for the purchase. All the gain he gains, upon ordinary principles, for those who are entitled to the property. But also the principle upon which I have before proceeded applies to both the assignee and the solicitor. My opinion is, that if there is any species of trustee or agent against whom the principle ought to be strictly held, it is the assignee in bankruptcy and the agents for him. In the case of general trustees, the party may have ample means from other sources. But the assignee has the bankrupt and his property altogether under his own disposal, and means of working upon him much more than trustees in ordinary cases have. So as to the solicitor under the commission. With regard to creditors, to what a scene it would open if either of them could buy the dividends for his own benefit? I go upon the naked principle; for upon these affidavits it is very strong

that the family of the bankrupt dealt with the solicitor, and state themselves as perfectly satisfied with his dealing with them. But upon the general principle it is obvious that bankruptcy would become a stock-in-trade if the solicitor can throw all difficulties in the way, making that the means of buying the dividends themselves." In *Whicheote v. Lawrence*, 3 Ves. 740, 750, Lord Rosslyn, dealing with the question of one occupying a fiduciary position purchasing the fiduciary estate, said: "It is stated as a proposition that a trustee cannot buy of a *cestui que trust*. Certainly that naked proposition is not correctly true; but an emanation from that which prevails in all cases, in all laws and countries, where trusts are admitted, led to great discussion in *McKenzie's case*, to prove that the sale, where the trustee to sell is the purchaser, is *ipso jure* null; that there is no sale, no contracting party. That is not the real sense of the proposition; but it is this, — which is very plain in point of equity, and a principle of clear reasoning, — that he who undertakes to act for another in any matter shall not in the same matter act for himself. Therefore a trustee to sell shall not gain any advantage by being himself the person to buy. He is not acting with that want of interest, that total absence of temptation, that duty imposed upon him that he shall gain no profit. The consequence is, beyond doubt, that in whatever shape that profit redounds to him, whether by management, which is the common case, or by superior good fortune, it is not fit that benefit shall remain to him. It ought to be communicated to those whose interests being put under his care afforded him the means of gaining that advantage." The principle, we think, is much better stated by Lord Eldon, in *Ex parte Lacey*, 6 Ves. 625, thus: "The rule I take to be this, — not that a trustee cannot buy from his *cestui que trust*, but that he shall not buy from himself. If a trustee will so deal with his *cestui que trust* that the amount of the transaction shakes off the obligation that attaches upon him as trustee, then he may buy. If that case (*Whicheote v. Lawrence*) is rightly understood, it cannot lead to much mistake. The true interpretation of what is there reported does not break in upon the law as to trustees. The rule is this: A trustee who is intrusted to sell and manage for others undertakes, in the same moment in which he becomes a trustee, not to manage for the benefit and advantage of himself. It does not pre-

connected with the discharge of his duties under the will. And even where the sale or pledge is made for other purposes, of which the purchaser or pledgee has no knowledge or notice, but takes

clude a new contract with those who have intrusted him. It does not preclude him from bargaining that he will no longer act as a trustee. The *cestuis que trust* may by a new contract dismiss him from that character; but even then that transaction by which they dismiss him must, according to the rules of the court, be watched with infinite and the most guarded jealousy; and for this reason, that the law supposes him to have acquired all the knowledge a trustee may acquire, which may be very useful to him, but the communication of which to the *cestui que trust* the court can never be sure he has made when entering into the new contract by which he is discharged. I disavow that interpretation of Lord Rosslyn's doctrine (in *Whicheote v. Lawrence*) that the trustee must take advantage. I say, whether he makes advantage or not, if the connection does not satisfactorily appear to have been dissolved, it is in the choice of the *cestuis que trust* whether they will take back the property or not, if the trustee has made no advantage." The ground of the rule is, that though you may see in a particular case that the trustee has not made advantage, it is utterly impossible to examine, upon satisfactory evidence in the power of the court, in ninety-nine cases out of a hundred, whether he has made advantage or not. The question is very elaborately examined by Chancellor Kent in *Davoue v. Fanning*, 2 Johns. Ch. 252, where the rule as above laid down by Lord Eldon is concurred in; and it was held that if a trustee, or person acting for others, sells the trust estate, and becomes himself interested in the purchase, the *cestuis que trust* are entitled, as of course, to have the purchase set aside, and the property re-exposed to sale under the direction of the court. And it makes no difference, in the application of the rule, that a sale was at public auction, *bonâ fide*, and for a fair price, and that the executor did not purchase for himself, but a third person, by previous arrangement, became the purchaser, to hold in trust for the separate use and benefit of the wife of the executor, who was one of the *cestuis que trust*. This doctrine is now well established. The cases to this effect are very numerous. *Herne v. Meeres*, 1 Vern. 465; *Ayliffe v. Murray*, 2 Atk. 59; *Fox v. Mackreth*, 2 Bro. C. C. 400; *Coles v. Trecothick*, 9 Ves. 234; *Ex parte Lacey*, 6 Ves. 625; *Morse v. Royal*, 12 Ves. 372; *Hunter v. Atkins*, 3 M. & K. 135; *Whicheote v. Lawrence*, 3 Ves. 740; *Scott v. Davis*, 4

M. & Cr. 87; *Kerr v. Lord Dungannon*, 1 Dr. & W. 509, 541; *Whelpdale v. Cookson*, 1 Ves. 9; *Lister v. Lister*, 6 Ves. 631; *Sanderson v. Walker*, 13 Ves. 601; *Downes v. Grazebrook*, 3 Mer. 200; *Campbell v. Walker*, 5 Ves. 678; *Lees v. Nuttall*, 1 Russ. & M. 53; 2 M. & R. 819; *Copeland v. Mere Ins. Co.*, 6 Pick. 196; *Reed v. Warner*, 5 Paige, 650; *Reed v. Norris*, 2 M. & Cr. 374; *Beal v. McKiernan*, 6 Mill. La. 407; *Matthews v. Dragand*, 3 Dess. 26; *Monroe v. Alaïre*, 2 Caines, Ca. 192; *Taylor v. Salmon*, 2 C. & M. 130. If the trustee has made any benefit by the transaction, he must account for it. If he has sustained a loss, he must bear that himself. *Ex parte Hughes*, 6 Ves. 622; *Ex parte Lacy*, 6 Ves. 628; *Ex parte Hodgson*, 1 Glyn & J. 14; *Ex parte Lewis*, *Ib.* 70; *Ex parte Buxton*, *Ib.* 357; *Ex parte Bage*, 4 Madd. 460; *Ex parte Bennett*, 10 Ves. 383; *Ex parte James*, 8 Ves. 347.

A party acting in a fiduciary capacity cannot sell to himself. Thus, where B. was a member of a firm of three partners, and also the surviving member of another firm of two partners, which was the sole or chief creditor of the first firm, B.'s executor purchased the estate of the first firm for his own benefit, with the result that nothing was left for B.'s widow and universal legatee. It was held by the privy council, affirming the decree of the Supreme Court of Natal, in a suit by the widow against the executor, that such sale was voidable, and that in this case it was not barred by delay or acceptance of money, on the ground either of ratification, acquiescence, or laches. *Beningfield v. Baxter*, 12 App. Cas. 167. See *Scunhouse v. Christian*, cited in *Norway v. Rowe*, 19 Ves. 158; *Hart v. Clarke*, 19 Beav. 356; *Prendergast v. Turton*, 1 Y. & C. 98; *Wentworth v. Lloyd*, 32 Beav. 474; *In re Cross*, 20 Ch. Div. 109; *Cockrell v. Cholmeley*, 1 Russ. & M. 424; *Savory v. King*, 5 H. L. Cas. 627.

By the civil law it was the rule that a guardian could not buy the property of his ward. The same rule was extended to like cases; that is, to curators, attorneys, and those who conduct the affairs of others. Dig. 18, l. 34. Again, Dig. 18, l. 46: "It is not allowed any one from the office which he performs to buy anything through himself or another." Our law, though derived from the civil law, differs from that, inasmuch as by the civil law one in a fiduciary position could purchase the trust property at public auction. Dig. 18, l. 34.

the property in good faith, the transaction will be sustained; for the purchaser or pledgee is not bound to see to the disposition of the proceeds received. But the case is otherwise where the purchaser or pledgee has knowledge of the perversion of the property to other purposes than those of the estate, or the intended perversion of the proceeds. The executor, though holding the title to the personal assets, is not absolute owner of them. They are not liable for his debts, nor can he dispose of them by will. He holds them in trust to pay the debts of the deceased, and then to discharge his legacies, and, as in all other cases of trust, he is personally responsible for any breach of duty. And property thus held, acquired from him by third parties with knowledge of his trust and his disregard of his obligations, can be followed and recovered. The law exacts the most perfect good faith from all parties dealing with a trustee respecting trust property. Whoever takes it for an object other than the general purposes of the trust, or such as may reasonably be supposed to be within its scope, must look to the authority of the trustee, or he will act at his peril.¹

Where one entitled to the property of a deceased person brings a suit against the agents of executors *de son tort* for money received for the sale of the property of the deceased, he ratifies and affirms the sale, and assumpsit for money had and received will lie for such proceeds.² A ratification of the sale is also a ratification of the act of the agent in respect to the payment of the proceeds of the sales to the executors *de son tort*.³ If a principal ratifies that which favors him, he ratifies the whole.⁴

¹ *Smith v. Ayer*, 101 U. S. 320. It is laid down by Savage, C. J., in *Colt v. Lasnier*, 9 Cow. 342, that the purchaser is safe if he is no party to any fraud in the executor, and has no knowledge or proof that the executor intended to misapply the proceeds, or was, in fact, by the very transaction, applying them to the extinguishing of his own private debt. But he buys at his peril; yet if he has no such proof or knowledge, he is not bound to inquire into the state of the trust, because he has no means to support the inquiry, and he may safely repose on the general presumption that the executor is in the due exercise of his trust. *Field v. Schieffelin*, 7 Johns. Ch. 150; *Saxon v. Barksdale*, 4 Dess. 526; *Miller v. Williamson*, 5 Md. 219; *Thomasson v. Brown*, 43 Ind. 203; *Petrie v. Clark*, 11 S. & R. 377; *McLeod v. Drummond*, 17 Ves. 152. Any person receiving from an executor the assets of his testator, knowing that this disposition of them is a violation of his duty,

is to be adjudged as conniving with the executor, and such a person is responsible for the property thus received, either as a purchaser or a pledgee. *Colt v. Lasnier*, 9 Cow. 342. The payment by the executor of his own private debt with the assets of his testator is a *devastavit*. *Cheek v. Watkins*, 2 S. & S. 199; *Cubbridge v. Boatwright*, 1 Russ. 549; *Pannell v. Hurley*, 2 Coll. 241; *Wilson v. Moore*, 1 My. & K. 337; *Keane v. Robarts*, 4 Madd. 357; *Eland v. Eland*, 4 M. & Cr. 427; *Miller v. Williamson*, 5 Md. 219; *Hill v. Simpson*, 7 Ves. 152; *Allender v. Riston*, 2 Gill & J. 98; *Albert v. Savings Bank*, 2 Md. 168.

² *Pickard v. Bankes*, 13 East, 20; *Spratt v. Hobbhouse*, 4 Bing. 173; *Israel v. Douglass*, 1 H. Bl. 239; *Beardsley v. Root*, 11 Johns. 464; *Hale v. Marston*, 17 Mass. 575; *Claffin v. Godfrey*, 21 Pick. 1.

³ *Gaines v. Miller*, 111 U. S. 395.

⁴ *Skinner v. Dayton*, 19 Johns. 513,

An agent, who, as to his principal, occupies a fiduciary relation, will not be allowed to put himself into a position in which his interest and his duty will be in conflict. Therefore, where a profit has been made by an agent, without the knowledge of his principal, in the course and execution of his agency, the agent must account to his principal for such profit. This rule is an inflexible one, which the courts will inexorably apply. And a trustee or

554; *Odiorne v. Maxey*, 13 Mass. 178, 182; *Menkins v. Watson*, 27 Mo. 163; *Small v. Atwood*, 6 Cl. & Fin. 232.

In *Cornett v. Williams*, 20 Wall. 226, the validity of the sale of a deceased person's property was questioned in collateral proceedings. But the court held that this could not be done. The power to review and reverse the decision made by a court having jurisdiction in the matter is clearly appellate in its character, and can be exercised only by an appellate tribunal in a proceeding had directly for that purpose. It cannot and ought not to be done in another case by another court, where the subject is presented incidentally, and a reversal sought in such collateral proceeding. The settled rule of law is that jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties unless impeached for fraud. Every intendment is made to support the proceeding. It is regarded as if it were regular in all things, and irreversible for error. In the absence of fraud no question can be collaterally entertained as to anything lying within the jurisdictional sphere of the original case. *McNitt v. Turner*, 16 Wall. 366; *Grignon's Lessee v. Astor*, 2 How. 341; *Voorhees v. The Bank of The United States*, 10 Pet. 449; *Stow v. Kimball*, 28 Ill. 93; *McCoy v. Morrow*, 18 Ill. 594; *Cody v. Hough*, 20 Ill. 45; *Kempe's Lessee v. Kennedy*, 5 Cranch, 172; *Canden v. Hurford*, 4 Ohio, 133; *Taylor v. McDonald*, 4 Ohio, 154.

Where there is a sale of goods by executors, even though they may not *in specie* have belonged to the testator, if the proceeds when recovered would be assets of the testator, the executors can sue in their representative capacity. *Abbott v. Parfitt*, L. R. 6 Q. B. 346. See *Cowell v. Watts*, 6 East, 409; *Heath v. Chilton*, 12 M. & W. 637; *Webster v. Spencer*, 3 B. & Ald. 360; *Aspinall v. Wake*, 10 Bing. 51; *Brassington v. Ault*, 3 Bing. 177; *Dowbiggin v. Harrison*, 10 B. & C. 666; *Boggs v. Bond*, 2 Rawle, 102.

In *Ventress v. Smith*, 10 Peters, 161, the United States Supreme Court held (1) that, under the laws of Alabama, an executor or administrator cannot sell per-

sonal property at private sale unless so directed by the will of a testator; nor can he sell at all without an authority from the orphans' court; and (2) that executors and administrators must pursue strictly their powers of sale, otherwise they do not divest the title or conclude those interested. *Emos v. James*, 4 Mun. (Va.) 194; *Knox v. Jenks*, 7 Mass. 488; *Lockwood v. Sturdevant*, 6 Conn. 387; *Berger v. Duff*, 4 Johns. Ch. 368.

In *Lamar v. Micon*, 112 U. S. 452, 475, it was held that a guardian has the authority without any order of court to sell personal property of his ward in his possession, and to reinvest the proceeds; *Field v. Schieffelin*, 7 Johns. Ch. 150; *Ellis v. Essex Merrimack Bridge Co.*, 2 Pick. 243; and the fact that such a sale during the rebellion was made by the guardian with the motive of avoiding its confiscation to the United States has no bearing on the question. The application of the funds of the ward to the purchase in New York of guaranteed bonds of the cities of New Orleans, Memphis, and Mobile, and of bonds of railways in the Southern States, indorsed by the States in which they were chartered, having been made with due care and prudence, and regard to the pecuniary interests of his ward, was sustained. But investment of the ward's funds in bonds of the Confederate States was held unlawful, and no legislative act or judicial decree or decision of any State could justify it. The court held that the Confederate Government was in no sense a lawful government, but was a mere government of force, having its origin and foundation in rebellion against the United States; that the notes and bonds issued in its name and for its support had no legal value as money or property except by agreement or acceptance of parties capable of contracting with each other, and could never be regarded by a court sitting under the authority of the United States as securities in which trust funds might be lawfully invested. *Lamar v. Micon*, 112 U. S. 452; *Thorington v. Smith*, 8 Wall. 1; *Head v. Starke*, Chase, 312; *Horn v. Lockhart*, 17 Wall. 570; *Confederate Note Case*, 19 Wall. 548; *Sprott v. United States*, 20 Wall. 459; *Fretz v. Stover*, 22 Wall. 198; *Alexander v. Bryan*, 110 U. S. 414.

agent for sale is precluded from purchasing from his own purchaser property which he has been entrusted to sell (except with the liability of having the transaction treated as for the benefit of his principal), so long, at least, as the contract remains executory, and the trustee or agent has power either to enforce it, or to rescind or alter it.

This principle is fully sustained in the important case of *Parker v. McKenna*,¹ where Lord Chancellor Cairns delivers an elaborate judgment. The defendants in that case, in 1864, were four of the directors in a joint-stock bank. In that year resolutions were passed to increase the capital by the issue of 20,000 new £50 shares, which were to be offered to the old shareholders at the rate of one new share for each old share held by them, each allottee paying for each share £25 premium, and £5 as a first call. The shares not taken up by them were to be disposed of by the directors at £30 premium. The directors entered into an arrangement with S. for him to take at £30 premium all the shares not taken up by the old shareholders. In pursuance of this, 9,778 shares were allotted to S., who paid only £5 per share, it being arranged that the certificates for these shares should be withheld; that the bank should have a lien on them for the premiums; and that no transfer from him to any purchaser should be registered till the £30 per share on the shares transferred had been paid. S., being unable to take up so many shares, applied to the defendants to relieve him of some of them, and they severally took from him considerable numbers at £30 per share, and afterwards disposed of them at a large profit, the £30 per share being paid to the bank at the times when the shares were respectively registered in the names of purchasers. It was held, affirming the decision of Bacon, V. C., that the defendants must account to the bank for the profit made by them respectively by sale of the shares.²

¹ L. R. 10 Ch. Ap. 96.

² See, where the same principle has been established, *York & North Midland Ry. Co. v. Hudson*, 16 Beav. 485; *Blissett v. Daniel*, 10 Hare, 493; *Hamilton v. Wright*, 9 Cl. & F. 111; *Tennant v. Trenchard*, L. R. 4 Ch. 53. And see *The New Zealand & Australian Land Co. v. Watson*, 7 Q. B. Div. 374, and *Harris v. Truman*, 9 Q. B. Div. 264, with reference to fiduciary relations existing between principals and agents; in the former of which cases it was held that, as the defendants did not stand in any fiduciary character towards the plaintiffs, the latter could not follow the proceeds of wheat into the hands of brokers employed to sell it

by the plaintiffs' agents, without giving credit for the sum due the defendants by the agents on their general account (see *Robbins v. Fennell*, 11 Q. B. 248; *Stephens v. Badcock*, 3 B. & Ad. 354; *Cobb v. Beeke*, 6 Q. B. 930; *Schmalzing v. Thomsinson*, 6 Taunt. 147; *Armstrong v. Stokes*, L. R. 7 Q. B. 593); and in the latter case it was held that, as a fiduciary relation existed between the plaintiff and his agent, the plaintiff was entitled to follow the proceeds of barley bought for him by his agent in the hands of his agent's trustee in bankruptcy, as the trustee could not stand in a better position than the bankrupt himself. *Rabone v. Williams*, 7 T. R. 360, n.; *Sims v. Bond*, 5 B. & Ad.

589; Mann v. Forester, 4 Camp. 60; Maans v. Henderson, 1 East, 335; Knatchbull v. Hallett, 13 Ch. Div. 708; *Ec parte* Kingston, L. R. 6 Ch. 632; *Ec parte* Cook, 4 Ch. Div. 123; Taylor v. Plumer, 3 M. & S. 562; Godfrey v. Furzo, 3 P. Wms. 185; Thompson v. Giles, 2 B. & C. 422; Frith v. Cartland, 2 H. & M. 417; *In re* Hallett's Estate, 13 Ch. Div. 696, 707.

As we have intimated *ante*, Book II., Part I. (and see also *ante*, Book II., Part III., § 3, p. 159, n. 2), the terms *void* and *voidable* have in numerous cases, particularly with reference to the contracts of infants, been used with much carelessness, the term *void* often being improperly employed where *voidable* is really meant. This looseness of expression has led to much discussion as to what contracts of infants are absolutely void and what are only voidable; and in some of the cases there is much refining and not less confusion in connection with these terms. It is now scarcely at all contended that *any* contracts of infants are absolutely void. Where they are not binding on the infant they are voidable at his election; and while the plea of infancy is a good defence for the infant, it obviously is no defence at all for the adult who has contracted with the infant. Nor can the adult derive any benefit from the fact that, as being binding on the one at the election of the other, there is no mutuality, and, therefore, no contract. There is no mutually binding contract until the election has been made by the party entitled to make it, and then there is not only the mutuality, but the power to avoid the contract is gone; and while it was never absolutely void it has ceased to be voidable. The same principle applies to contracts which may be avoided for fraud, or for what is akin to fraud, where the parties buying and selling are in a fiduciary relationship with those to whom they sell or from whom they buy.

In Michod v. Girod, 4 How. 503, which was a case where proceedings were taken to set aside and annul the purchases of executors who had purchased the entire estate of their testator, and where the executors claimed that the purchase was rightfully made, without fraud in fact or in intention, at a fair price at public auction, the United States Supreme Court — Wayne, J., delivering the judgment — involve themselves in much confusion by the improper use of the term *void*, using the term in the sense of the act having been absolutely void, instead of being only voidable at the election of the injured party. The same term *void* is often used in other instances in statutes and judicial decisions where the meaning is not intended to be absolutely void, but merely that it may be

avoided, — voidable. A familiar instance of this is in connection with voluntary conveyances under the statute of Elizabeth, where, as against creditors, the conveyance is spoken of as “fraudulent and void,” meaning merely that it is voidable within defined limits, and within those limits, being deemed fraudulent, may be set aside. The confusion in Michod v. Girod is painfully obvious. The following is a sample of the language: “*The purchase is void, and will be set aside at the instance of the cestui que trust, and a resale ordered on the ground of the temptation to abuse, and of the danger of imposition inaccessible to the eye of the court.*” *Ibid.* at p. 557. If the purchase will “only be set aside at the instance of the *cestui que trust*” then it is palpably absurd to call the purchase void, using that term expressly in distinction to the term *voidable*, when the very language they use shows, in effect, that the purchase was not void, but voidable only “at the instance of the *cestui que trust*.” And with added confusion they go on to say: “We are aware that cases may be found in the reports of some of the chancery courts in the United States, in which it has been held that an executor may purchase, if it be without fraud, any property of his testator at open and public sale for a fair price, and that such purchase is only voidable, and not void, as we hold it to be.” They then add: “But with all due respect for the learned judges who have so decided, we say that an executor or administrator is in equity a trustee for the next of kin, legatees, and creditors, and that we have been unable to find any one well-considered decision, with other cases, or any one case in the books, to sustain the right of an executor to become the purchaser of the property which he represents or any portion of it, though he has done so for a fair price, without fraud, at a public sale.” And yet with singular inconsistency they cite as a “well-considered decision” the case of McCarty v. The Steam Cotton Press Co., 5 La. 16, where “the property was sold at auction, and the mother of the minor became the purchaser. It was contended that this purchase was *null and void*, because the property had descended to the children immediately after the death of the father; and the mother, who by the effect of the law was their natural tutor, *could not buy it*. The court said it was a general rule. [This still further shows the confusion of the courts in the matter.] But it having been shown that the mother and purchaser had petitioned the court of probate for a *ratification of the sale*, and that the court *had ratified it* upon the advice of a family meeting, *the sale was confirmed.*” The

sale was "ratified" and "confirmed." This shows clearly that the sale was not, *ab initio*, or *per se*, void, but simply voidable, and was open to be either avoided or "set aside at the instance of the *cestui que trust*," or, at the same instance, or with the same request, be ratified and confirmed. And in the principal case itself, where "the chancery courts in the United States" are condemned for holding that such purchases are not void *per se*, but are merely voidable, the court itself shows that why "the receipts or acquittances given by two of the complainants to the executors" (at p. 561) did not in effect amount to a ratification of the merely voidable purchase by the executors, was because their "receipts or acquittances . . . were obviously given without full knowledge of all the circumstances connected with the disposal and management of the estate;" information and vouchers being withheld by the executors, who indulged in "menaces of displeasure mingled with intimations of future kindness." *Ergo*, in a reverse state of affairs, the receipts or acquittances would have amounted to an affirmation of the voidable purchase, and, thereafter, it could not even be rendered void. Just as, as is shown in the case itself, where there is no inadequacy of price, and no inequality in the bargain, and no fraud or concealment, and no advantage taken by the trustee of information acquired by him as trustee, a purchase by a trustee of his *cestui que trust*, *sui juris*, provided it is deliberately agreed or understood between them that the relation shall be considered as dissolved, "and there is a clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, and it is clear that the *cestui que trust* intended that the trustee should buy, will be sustained in a court of equity." *Coles v. Trecothick*, 9 Ves. 246; *Fox v. Mackreth*, 2 Bro. Ch. 400; *Gibson v. Jeyes*, 6 Ves. 277; *Whicheote v. Lawrence*, 3 Ves. 740; *Campbell v. Walker*, 5 Ves. 678; *Ayliffe v. Murray*, 2 Atk. 59. And it is quite safe to say that where a trustee who is *sui juris* has purchased the property of his *cestui que trust*, to the manifest advantage of the latter, no one well-considered decision can be found where such a mere voidable purchase has been set aside or rendered void at the instance of the trustee, as regards whom such a purchase is not even voidable, much less void. The rule may be correctly stated that the purchase is voidable, and not absolutely void, and may be set aside at the instance of the *cestui que trust*, or may be ratified and affirmed by him at his election, properly and intelligently exercised.

In a case which we have already ex-

amined in this Part (*Ex parte Lacey*, 6 Ves. 625), Lord Eldon clearly lays down the rule that the trustee may contract with the *cestui que trust*, where the *cestui que trust*, by a new contract, dismissed the trustee from that character, and while the court watches the proceedings with great jealousy, "it is in the choice of the *cestuis que trust*, whether they will take back the property or not; if the trustee has made no advantage." In *Whelpdale v. Cookson*, 1 Ves. Jr. 9; 5 Ves. 682, where a bill was filed by a creditor against the defendants as executors and trustees, to set aside a purchase by the trustees, at public auction, of the trust property; Lord Hardwicke ordered the creditors to elect whether they would abide by the purchase. The court further ordered that if the majority of them elected not to abide by the purchase, then the property was to be put up again, and sold before the master; but if the majority elected to abide by the purchase, the trustee was to account for the purchase-money with interest. Lord Eldon, in *Ex parte Lacey*, 6 Ves. 625, 628, dissented from this latter holding, but only on the ground that the majority of the *cestuis que trust* could not, at their election, bind the minority; but, as we have seen by the language he himself used in *Ex parte Lacey*, he was very far from dissenting from Lord Hardwicke in his view that it was the right of the *cestuis que trust* "to elect whether they would abide by the purchase." In such case, of course, the sale was not "void," but voidable only, at the election of the *cestuis que trust*.

The cases are very numerous in which it has been held that, even where the case has been lacking in *bona fides*, the *cestui que trust*, having knowledge thereof, may acquiesce in the purchase or other dealing by the trustee, with the trust estate; and in many cases it has been held, that, with such knowledge, laches on the part of the *cestui que trust* will amount to acquiescence. Thus, in *Chalmer v. Bradley*, 1 Jac. & Walk. 59, it was held that application to impeach a sale to a trustee must be made within a reasonable time. And in *Gregory v. Gregory*, Coop. 201; s. c. affirmed, Jac. 631, a bill to set aside a purchase by a trustee for himself and his children, was, because of a lapse of eighteen years, dismissed upon the length of time only. In *Campbell v. Walker*, 5 Ves. 678, the law is thus laid down: "The question will always be, whether the *cestuis que trust* have lain by; or whether there has been any ratification. I will lay down the rule as broad as this; and I wish trustees to understand it; that any trustee purchasing the trust property is liable to have the

purchase set aside, if, in any reasonable time the *cestui que trust* chooses to say he is not satisfied with it. The trustee purchases, subject to that equity; that if the *cestuis que trust* come in a reasonable time, they may call to have the estate resold. I will lay down the rule as broad as that."

In *Coles v. Trecothick*, 9 Ves. 234, Lord Eldon expressly sustained such a purchase, where the *cestui que trust* had full information and assisted in the sale. The principles governing the matter are thus stated. Says Lord Eldon: "Upon the question as to a purchase from the *cestui que trust*, I agree that the *cestui que trust* may deal with his trustee, so that the trustee may become the purchaser of the estate. But, though permitted, it is a transaction of great delicacy, and which the court will watch with the utmost diligence; so much, that it is very hazardous for a trustee to engage in such a transaction. . . . A trustee may buy from the *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, providing the *cestui que trust* intended that the trustee should buy; and there is no fraud taken by the trustee, of information acquired by him in the character of trustee." So the sale by a trustee of stock which a trustee holds in trust, is not absolutely void, but voidable only, at the election of the *cestui que trust*, who has the option either to have the stock replaced, or to take the money produced by the sale with interest. *Forrest v. Elwes*, 4 Ves. 497; *Pietz v. Stace*, 4 Ves. 620. And if a trustee misapply the funds of the *cestui que trust* and purchase a judgment or other security therewith, the act is voidable at the election of the *cestui que trust*, who can elect to take such judgment or security, or require the trustee to make good the original purchase. *Steele v. Babcock*, 1 Hill, 527. So the master of a ship, purchasing the ship at a sale by public authority, cannot purchase for himself, unless the owner afterwards elects to allow him the right. *Chamberlain v. Harrod*, 5 Greenl. 429; *Church v. Marine Ins. Co.*, 1 Mas. 341; *Barker v. Maine Ins. Co.*, 2 Mas. 369; *The Schooner Tilton*, 5 Mas. 462, 480. In *Morse v. Royal*, 12 Ves. 355, a purchase by a trustee from the *cestui que trust* was established under the circumstances of the case, where there had been confirmation and acquiescence.

It has been repeatedly held in this country, that the purchase of the trust property by the trustee, or one occupying a position of that character, is not absolutely void, but is voidable only at the election of the *cestui que trust*. *Davoue v. Fanning*, 2 Johns. Ch. 252; *Rogers v.*

Rogers, 1 Hopks. 515; *Van Horn v. Fouda*, 5 Johns. Ch. 388; *Saltmarsh v. Beane*, 4 Port. 283; *Litchfield v. Cudworth*, 15 Pick. 23, 31; *Copeland v. Merc. Ins. Co.*, 6 Pick. 198; *Grider v. Payne*, 9 Dana, 190; *Richardson v. Jones*, 3 Gill & J. 163; *Haddix v. Haddix*, 5 Litt. 202; *Davis v. Simpson*, 5 Har. & J. 147; *Brackenridge v. Holland*, 2 Black. 377; *Arnold v. Brown*, 24 Pick. 96; *De Caters v. Le Roy De Chamont*, 3 Paige, 178; *Perry v. Dixon*, 4 Dess. Eq. 504, note; *Butler v. Haskell*, *Id.* 654; *Davis v. Simpson*, 5 Har. & J. 147; *Boyd v. Hawkins*, 2 Bat. & Dev. Eq. 207; *Wade v. Pettibone*, 11 Ohio, 57; *Mills v. Goodsell*, 5 Conn. 475; *Prevost v. Gratz*, 1 Peters, C. C. 368; *Harrington v. Brown*, 5 Pick. 519; *Denn v. McKnight*, 6 Halst. 585; *Wilson v. Troup*, 2 Cow. 196; 7 Johns. Ch. 25; *Jackson v. Woolsey*, 11 Johns. 446; *Denn v. Wright*, 2 Halst. 175. And such sale is capable of confirmation. *Prevost v. Gratz*, 1 Peters, C. C. 368; *Jackson v. Woolsey*, 11 Johns. 446; *Gallatin v. Cunningham*, 8 Cow. 361; *Crowe v. Ballard*, 3 Bro. C. C. 120, note (c); *Gwynne v. Heaton*, 1 Bro. C. C. 3, note (1). But in all these cases, if the principal, after a full knowledge of all the circumstances, deliberately ratifies the act of the trustee or acquiesces in it for a great length of time, it will become obligatory upon him; not by its own intrinsic force, but from the consideration that he thereby waives the protection intended by the law for his own interests, and deals with the trustee as a person, *quoad hoc*, discharged of his fiduciary character. *Hawley v. Cramer*, 4 Cow. 717; *Van Epps v. Van Epps*, 9 Paige, 237; *Scott v. Davis*, 2 Myl. & C. 87; *Prevost v. Gratz*, 1 Peters, C. C. 368; *Fox v. Mackreth*, 2 Bro. C. C. 400, 401; *Hayward v. Ellis*, 13 Pick. 276; *Ball v. Carew*, *Id.* 28.

Length of time will not, however, furnish a presumption of acquiescence in such a purchase, unless it appears that the *cestui que trust* had notice that the trustee had become a purchaser. *Prevost v. Gratz*, 1 Peters, C. C. 370; *Schiffelin v. Stewart*, 1 Johns. Ch. 620; *Quarles v. Lacy*, 4 Munf. 251; *McGuire v. McGowan*, 4 Dess. 486; *Perry v. Dixon*, *Id.* 504; *Anderson v. Fox*, 2 Hen. & M. 245; *Eichelberger v. Barintz*, 1 Yeates, 307; *Hawley v. Marcus*, 7 Johns. Ch. 174; *Ex parte Wiggins*, 1 Hill, Eq. 354; *Davis v. Simpson*, 5 Har. & J. 147; *Boyd v. Hawkins*, 2 Bat. & Dev. Eq. 207; *Lazarus v. Bryson*, 3 Binn. 54; *Campbell v. Penn. Life Ins. Co.*, 2 Whart. 53; *Brackenridge v. Holland*, 2 Blackf. 377; *Wade v. Pettibone*, 11 Ohio, 57; *Mills v. Goodsell*, 5 Conn. 475; *Lovell v. Briggs*, 2 N. H. 218; *Currier v. Green*, *Id.* 225. And see

Ryder *v.* Bickerton, 3 Swans. 81; Harden *v.* Parsons, 1 Eden, 145; Walker *v.* Symonds, 3 Swans. 64; Broadhurst *v.* Balguy, 1 Y. & C. Ch. 16; Phillipson *v.* Gatty, 7 Hare, 516; affirmed 2 H. & Tw. 459; Munch *v.* Cockerell, 5 Myl. & C. 179; Hawkins *v.* Gardner, 2 Sm. & G. 441; Farrar *v.* Barraclough, *Ib.* 231; *Re* McKenna, 5 L. T. N. s. 241; Farrant *v.* Blanchford, 1 De G. J. & S. 107; Aveline *v.* Mellhuish, 2 De G. J. & S. 288; Life Assoc. of Scotland *v.* Siddall, 3 De G. F. & J. 58; Butler *v.* Carter, L. R. 5 Eq. 276; Griffiths *v.* Porter, 25 Beav. 236; *Re* Cross, 20 Ch. Div. 109, as to acquiescence.

BOOK II.

PART VII.

PARTNERS' SALES.

1. WHAT CONSTITUTES A PARTNERSHIP.

THE contract of partnership, according to the civil law, is nothing otherwise than the contract of agency.¹

A man who allows another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, is undoubtedly the principal, and the person so employed is the agent, and the principal is liable for the agent's contracts in the course of his employment. So, if two or more agree that they should ostensibly carry on a trade, and share the profits of it, each is a principal, and each is an agent for the other, and each is bound by the other's contracts in carrying on the trade, as much as a single principal would be by the act of an agent, who was to give the whole of the profits to his employer. Hence it becomes a test of the liability of one for the contract of another, that he is to receive the whole or a part of the profits arising from that contract by virtue of the agreement made at the time of the employment.²

For a hundred years the common-law cases wandered away from the principles of the civil law, as stated above, in reference to the test of a partnership. "Perhaps the maxim that he who partakes the advantage ought to bear the loss, often stated in the earlier cases on this subject, is only the *consequence*, not the *cause*, why a man is made liable as a partner."³

Among the various tests in the old cases, as to the existence of a partnership, were (1) the sharing in the profits; (2) the sharing in the profits as profits, not as wages, etc.; (3) the sharing in the *net* rather than in *gross* profits; (4) the being entitled to an account of the profits.⁴

¹Pothier says, — "*Contractus societas non secus ac contractus mandati.*" Pand. lib. 17, tit. 2, Introduction. "The law as to partnership is undoubtedly a branch of the law of principal and agent; and it would tend to simplify and make more easy of solution the questions which

arise on this subject, if this true principle were more constantly kept in view." *Per* Lord Wensleydale, in *Cox v. Hickman*, 8 H. of L. Cas. 268, 312.

²*Cox v. Hickman*, *Ibid.*

³*Cox v. Hickman*, *Ibid.*

⁴*Grace v. Smith*, 2 W. Bl. 99; Waugh

In *Ex parte Hamper* (*supra*), Lord Eldon said: "The cases have gone farther to this nicety; upon a distinction so thin, that I cannot state it as established upon due consideration; that if a trader agrees to pay another person for his labor in the concern a sum of money, even in proportion to the profit, equal to a certain share, that will not make him a partner; but if he has a specific interest in the profits themselves, as profits, he is a partner." And again: "It is clearly settled, though I regret it, that, if a man stipulates, that, as the reward of his labor, he shall give, not a specific interest in the business, but a given sum of money even in proportion to a given *quantum* of the profits, that will not make him a partner; but if he agrees for a part of the profits, as such, giving him a right to an account, though having no property in the capital, he is, as to third persons, a partner; and in a question with third persons no stipulation can protect him from loss."¹

The doctrines in these cases have been largely acted upon in this country.²

The case of *Cox v. Hickman*³ brought back the law in principle to where it started in the civil law. That case has been repeatedly followed. In *Kilshaw v. Jukes*,⁴ it was held, on the authority of *Cox v. Wickman*, that the test whether a person who is not an ostensible partner in a trade, is, nevertheless, in contemplation of law, a partner, is — not whether he is entitled to participate in the profits; although this affords cogent, often conclusive, evidence of it — but whether the trade has been carried on by persons acting on his behalf. There is this thing certain, that if the test of partnership were simply as to the right of sharing in the profits of a business, then not only would *Cox v. Hickman* — holding, as it does, that the creditors of a concern, the business of which was carried on by trustees, the profits of

v. Carver, 2 H. Bl. 235; *Hoare v. Dawes*, 1 Doug. 371; *Coope v. Eyre*, 1 H. Bl. 37; *Hesketh v. Blanchard*, 4 East, 144; *Ex parte Rowlandson*, 1 Rose, 91; *Ex parte Hamper*, 17 Ves. 403.

¹ *Ibid.* at pp. 404, 412. See further *Ex parte Langdale*, 18 Ves. 300; *Ex parte Watson*, 19 Ves. 409; *Ex parte Hodgkinson*, 19 Ves. 291; *In re Colbeck*, Buck, 48; *Ex parte Digby*, 1 Deac. 341; *Tench v. Roberts*, 6 Madd. 145; *Witherington v. Herring*, 3 Moo. & P. 30; *Cheap v. Cramond*, 4 B. & Ald. 663; *Wilkinson v. Frazier*, 4 Esp. 182; *Perrot v. Bryant*, 2 Y. & C. 61; *Mair v. Glennie*, 4 M. & S. 240; *Barry v. Nesham*, 3 C. B. 641.

² See *Loomis v. Marshall*, 12 Conn.

69; *Champion v. Bostwick*, 18 Wend. 175; *Vandenburgh v. Hull*, 20 Wend. 70; *Thompson v. Snow*, 4 Greenl. 264; *Cutter v. Winsor*, 6 Pick. 335; *Bailey v. Clark*, 6 Pick. 372; *Turner v. Bissell*, 14 Pick. 193; *Hardin v. Foxcroft*, 6 Greenl. 76; *Berthold v. Goldsmith*, 24 How. 536; *Gibson v. Stone*, 43 Barb. 235; *Voorhees v. Jones*, 5 Dutch. 270; *Stevens v. Faucet*, 24 Ill. 483; *Robbins v. Laswell*, 27 Ill. 365; *Fawcett v. Osborn*, 32 Ill. 411; *Macy v. Combs*, 15 Ind. 469; *Reynolds v. Hicks*, 19 Ind. 113; *Braley v. Goddard*, 49 Me. 108; *Atherton v. Tilton*, 44 N. H. 452; *Whitney v. Ludington*, 17 Wis. 140; *Wright v. Davidson*, 13 Minn. 449.

³ 8 H. of L. Cas. 268.

⁴ 3 B. & S. 847.

which were to go to the creditors, and yet that this did not constitute the creditors partners with the trustees — be wrongly decided, but all that large class of cases which holds that clerks, sailors, etc., who may be paid their wages by a share of the gross or net profits, would, also, be wrongly decided. Not only so, but in very many cases, in which a mere co-ownership exists in property, where, by virtue of such co-ownership there is a participation in the profit derived from the hire or other use of the property, it would have to be held that a partnership existed. But it is quite clear that in a simple co-ownership, while the co-owners might have the right to divide the profits gained from the hire or other use of the property, this would not constitute a partnership, nor make the mere co-owners liable as partners.¹ Yet, while the co-ownership would entitle the co-owners to a share of the profits resulting from the hire or use of the common property, and still, as we have seen, this would not constitute them partners, mere co-owners, as such, would not possess the power necessarily and inseparably connected with the contract of partnership, that of agency, as laid down in our citation from Pothier, and as decided by *Cox v. Hickman* and the other cases which have followed it. For a mere co-owner simply represents himself and his co-ownership of the common property, and he has no power, by his contracts, to bind his co-owner, or to exercise as between them any powers resulting from the relationship of principal and agent.²

*Bullen v. Sharp*³ is another case following *Cox v. Hickman*.⁴ The facts were as follows: S., being about to commence business as an underwriter at Lloyd's through the agency of F., in consideration of the defendant (the father of S.), engaging with F. to hold a sum of £5,000 available for his son for the purpose of carrying out the arrangement, gave the defendant the following memorandum: "In consideration of your guaranteeing me to the extent of £5,000 in my business of underwriter, until by such business I shall make or acquire from the profits thereof £5,000,

¹ *Kay v. Johnston*, 21 Beav. 536; *Quackenbush v. Sawyer*, 54 Cal. 439; *Post v. Kimberley*, 9 Johns. 470; *Hawes v. Tillinghast*, 1 Gray, 289; *Saville v. Robertson*, 4 T. R. 720; *Hoare v. Dawes*, Dong. 371; *Coope v. Eyre*, 1 H. Bl. 37; *Holmes v. The United Ins. Co.*, 2 Johns. 238; *Finckle v. Stacey*, Sel. Cas. Ch. 9; *Reggio v. Braggiotti*, 7 Cush. 166; *Rice v. Austin*, 17 Mass. 197; *Hazard v. Hazard*, 1 Story, 371; *Gill v. Kuhn*, 6 S. & R. 333; *Turner v. Bissell*, 14 Pick. 192; *Loomis v. Marshall*, 12 Conn. 69; *Putnam v. Wise*, 1 Hill, 239; *Hesketh v. Blanchard*, 4 East, 144; *Muzzy v. Whitney*, 10 Johns. 228.

² See 2 Wash. on Real Property, p. 685 *et seq.* "Tenants in Common," and cases cited. And see Lit. §§ 311, 321; Co. Lit. 200 a; *Rehoboth v. Hunt*, 1 Pick. 224; *Brisco v. McGee*, 2 J. J. Marsh. 370; *Allen v. Gibson*, 4 Rand. 468; *Johnson v. Harris*, 5 Hayw. 113; *Hines v. Frantham*, 27 Ala. 359; *Hughes v. Holliday*, 3 Greene, 30; *Young v. Adams*, 14 B. Mon. 127; *Williams on Personal Property*, 282.

³ *Bullen v. Sharp*, 18 C. B. n. s. 614, reversed on appeal, in the Exchequer Chamber; L. R. 1 C. P. 86; 35 L. J. C. P. 105.

⁴ 8 H. L. Cas. 268.

after providing for all known losses, I hereby promise and agree to pay to you during your life, in case I shall so long live, an annuity of £500, being equal to £10 per cent per annum on £5,000, and further, that, if at the end of three years from the date hereof, it shall appear that one fourth of the net average annual profits during that period made by me in the said business shall amount to more than £500, the said annuity shall thenceforth be increased to a yearly sum equal to one fourth of such net average annual profits made by me in the said business during the said three years." And the memorandum concluded with these words: "Moreover, in no case are you to be considered as a partner with me in the said business of an underwriter." It was held, by the Court of Common Pleas, and affirmed on this point by the Exchequer Chamber, that this memorandum did not constitute the defendant a partner with his son. By a settlement afterwards made on his marriage, S. assigned to the defendant and one D., as trustees, "all and singular the sums of money, earnings, profits, and emoluments which are now in the hands of F., and all such as shall hereafter come into the hands of F., on account or in respect of the said underwriting business." The deed also contained a power of attorney, authorizing the defendant and his co-trustee to receive the whole proceeds of the business; and the first trust was to pay the defendant £500 a year, with an additional sum when the profits of the business should have realized a given sum, and a covenant that, when the accumulated profits should have reached £8,500, and continued at that amount without reduction for two years, the trustees should re-assign to S. "the said monies and profits arising from the aforesaid underwriting business." In an action *upon a policy signed by F. in the name of S.*, it was held by the Exchequer Chamber, Pigott, B., and Shee, J., dissenting, reversing the judgment of the Common Pleas, that the marriage-settlement did not, either alone or in conjunction with the memorandum, render the defendant liable as a partner with S. in his underwriting business.¹

¹ It is notable in this case that it was conceded on all sides that they were bound by the decision of *Cox v. Hickman*, 8 H. L. C. 268. Blackburn, J., correctly stated the effect of that case thus: "The case of *Cox v. Hickman* being a decision of the House of Lords, the ultimate Court of Appeal, overrules all earlier authorities inconsistent with that decision, and, so far as the judgment goes, fixes the law in this country. We are not bound by all that is said in the course of a judgment of the House of Lords; but that which appears to be the rule established by the decision

of that tribunal is binding, not only on all inferior tribunals in this country, but even on that House itself when sitting judicially." *Bullen v. Sharp*, L. R. 1 C. P. at p. 108. Pigott, B., one of the two dissenting judges, also said, "The principle of the law applicable to the case is stated in *Cox v. Hickman*, in a very clear judgment of Lord Cranworth, thus:— 'The real ground of liability [as a partner] is, that the trade has been carried on by persons acting on his behalf [that is on behalf of the person sought to be made liable], so that he would stand in the rela-

As was stated in *Bullen v. Sharp*,¹ the holding in *Cox v. Hickman*² is conclusive on all courts in England. In this country, as

tion of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made.' Now, applying this exposition of the law of partnership to the facts of the present case I find that the contract is made by F. in Sharp, Jr.'s, name, and the question therefore is, whose agent was F. ? or in other words, although apparently acting for Sharp, Jr., alone, was he really acting for both the Sharps ?" *Ibid.*, at p. 105. The other dissenting judge Shee, J., after dealing, at p. 98, with the question arising under the memorandum, alone, securing the payment of the annuity of £500, thus : — "Though fixed apparently, on an estimate of the probable amount of profits, and to increase with an increase of profits, it was not necessarily, or even probably, in the first instance, payable out of profits ; and regard being had to the consideration for it, was not within, or was barely within, the mischief to prevent which the sharing of the profits has been considered in many cases as cogent, though not conclusive, evidence of a partnership, and liability for its debts. Whether the £500 annuity was in fact paid to the defendant out of the profits or not, the defendant would not *rebus sic stantibus*, have been liable for its debts. The definition of a partnership, — '*Contractus consensualis de re vel operis communicandis lueri in commune faciendi causa*' (L. 63, pr. ff. Societate), was not satisfied by the relation between him and his son. They did not intend to be partners ; and the business was not carried on by the defendant or by any other person on his behalf, in partnership or not in partnership with him : " — proceeds to deal with the other question thus : "This state of things, however, was materially altered under the marriage settlement, after the marriage of Sharp, Jr. . . . Previously to the date of marriage, unless we assume, which there seems no ground for doing, the whole scheme to have been illusory and collusive from its inception, the defendant had no more to do with the carrying on by himself or his agent of the underwriting business than Cox or Wheatcroft, in the case of *Cox v. Hickman*, had in carrying on the business of the new firm of the Stanton Iron Company for the benefit of the creditors of the old firm of Smith & Co. After the date of the marriage, the defendant had as much to do with the carrying on of the underwriting business, as the trustees in *Cox v. Hickman* had in carrying on by any agents they

might employ, the business of the Stanton Iron Company for the benefit of the creditors of Smith & Co. The business of the Stanton Iron Company, in *Cox v. Hickman*, was the business of the trustees, carried on by them for objects with which the parties dealing with them had no concern ; the trustees were, therefore, held liable for its debts. In this case, the underwriting business had become the business of the defendant and Dennison (the defendant's co-trustee), and they, as I think, had become liable for its debts ; not because they shared the profits, which one of them did not share, but *because it was their business*, carried on for them with their funds, by F., as their agent, in the name of Sharp, Jr., at a salary to be paid to F. by himself out of their capital which he held, or out of profits which he made for them." It will thus be seen that both of the dissenting judges fully assented to the law as laid down in *Cox v. Hickman*, and both thereby concurred in the fact that the old doctrine of *Wagh v. Carver*, 2 H. Blk. 235, that "he who takes a moiety of all the profits indefinitely, shall by operation of law, be liable to losses, if losses arise, upon the principle that by taking a part of the profits he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts," was expressly overruled, and is not law. It is also observable that Shee, J., considered the defendant in *Bullen v. Sharp*, no further, or otherwise liable as a partner than was his co-trustee, Dennison, who was not to share the profits at all ; who was not made a party to the action, and against whom no claim whatever of liability had been made. The only question in dispute in the Exchequer Chamber was, not as to whether the defendant's right to the profits made him a partner with Sharp, Jr., but whether F. in carrying on the business as agent of Sharp, Jr., was not also doing so as agent of the trustees. This case differs from that of *Cox v. Hickman*, inasmuch as in that case the trustees were carrying on the business, and it was sought to make the creditors, who were to receive the profits, liable as partners with the trustees, and it was held that the receipt of the profits did not constitute them partners. In *Bullen v. Sharp*, it was sought to make one of the trustees under a marriage settlement liable for the losses, because it was claimed the business was really his, as well as that of his son. The court in this case, in addition to unani-

¹ L. R. 1 C. P. at p. 103.

² 8 H. L. C. 263.

mere authority, although, on that ground, entitled to every respect, it is, of course, not conclusive. But, as regards both *Cox v. Hickman* and *Bullen v. Sharp*, so far as these cases are correctly decided and, therefore, so far as they are sound law, they are as much binding on that ground in this country, and in all other places where the principles of the common law govern, as they are in England.

The question is of sufficient importance, and has been involved in so much doubt as to justify its further consideration. It is not, of course, claimed that the doctrine of agency is alone necessarily the criterion by which to judge in every case whether a partnership exists or not, because the relation of principal and agent may exist and does exist in many cases where there is no partnership. But the principle is, that where there is a partnership existing, necessarily there exists between the parties the relationship of principal and agent, and where this is wanting, the relationship between the parties is not that of partners; the general principle as to agency applying to partnership as well, that a liability may be created by holding out another as an agent, or by one holding himself out as a partner, when, in fact, there was no agency on the one hand or partnership on the other.

On the other hand, we think it is equally as clear that the test in *Waugh v. Carver*,¹ is not sound; that, where this relationship of principal and agent are wanting, both of the elements of being entitled to a share of the profits and having to bear a share of the losses, may be found, and yet the contract of partnership may not

mously assenting to the correctness of the decision of *Cox v. Hickman*, held that the business was not carried on by the trustees, but by Sharp, Jr., by his agent, F., and that the trustees were not liable; the defendant, not any more than his co-trustee. Bramwell, B., met the question fairly, thus: "If the defendant was really the principal, or one of the principals, in the transaction; if those who really acted were his agents; if, on the truth appearing, he had a right to say the contract was made with him, and to enforce it, he ought to be and would be liable. As, for instance, if there was a business which required the buying of goods on credit, and if a person tried to carry it on in the name of an agent, whether such agency was an agency of a partnership or any other, so that, upon the purchase of goods by the agent or partner, the property vested wholly or in part in the first-named person, then he would be, as it seems to me, liable, though he had stipulated with his agent or partner that he should not be; because he would have tried for an impos-

sibility, for a thing repugnant in itself, viz., that the contract should be made with him, for his benefit, but not to bind him." Then on a full examination of the facts — the liability from mere participation in the profits being eliminated from the case, — the learned baron finds that, as admitted in the statement of facts in the special case, "F. carried on the underwriting business for Sharp, Jr., until and at the time of making the policy," and that the defendant was not liable. We think there was no escape from such holding, and that both *Cox v. Hickman*, and *Bullen v. Sharp*, are sound law. We here, incidentally notice that Mr. Baron Bramwell ridicules that distinction, — wire drawn to attenuation, — that Mr. Justice Story calls "satisfactory," that of the two servants of a firm, the one who receives a tenth of the profits is liable for its debts, and the other who receives a sum equal to a tenth is not. See Story on Partn. § 32 *et seq.*

¹ 2 H. Bl. 235.

exist, either as between the parties themselves or as to third persons. Even before the principle that sharing in the profits made one a partner, with the ground on which it rested, that that was taking from the funds to which the creditors had a right to look, was refuted in *Cox v. Hickman*, the cases were numerous in which it was held that a clerk might receive a share of the profits as wages, and yet not be a partner.

But it is stated, in effect, in one of the late English cases, notwithstanding the holding in *Cox v. Hickman*, that there has been no case which has decided that where there has been a participation in both profits and losses, that a partnership has not existed.¹ We think, however, that this is wrong. In the very case of *Cox v. Hickman*, the creditors, who were decided by the House of Lords, not to be partners, while they were to participate in the profits in payment of their claims, would also have to bear the losses resulting from the business to the relative extent of their several claims. It was this very fact with which, in *Cox v. Hickman*, the House of Lords stood confronted, that the business was to be carried on by the trustees for the actual profit or loss of the creditors, that forced them to an investigation of the rule in *Waugh v. Carver*, and to its overthrow. For, in only one degree more remote, any ordinary creditor of one carrying on business is affected by the profits and losses of his debtor than was the case in *Cox v. Hickman*; and had the creditors in that case been held liable as partners, because the business was carried on by trustees, it would be difficult, on principle, to stop short there; but, consistently, as the next step, the creditors should be held liable as partners with their debtor, where the business was carried on by himself, as ordinarily, without the intervention of trustees, and not with them as in *Cox v. Hickman*.

Again, in that very common case of whaling voyages, where the officers and crew receive their wages by a certain "lay" in proportion to the oil obtained, they are not only entitled to their agreed share of the gain from the oil obtained, but are liable to their share of the loss to the extent of their wages — their contribution to the capital — if the fishing should prove a failure. The case, too, of the clerk who is to receive his salary from a share of the profits, is one, also, where the clerk shares in the loss to the extent of his wages where the losses are as great as the profits. So mere co-owners of some descriptions of personal property, as live stock (the relationship of principal and agent not existing), might be mutual sharers in the increase and from the hiring of the common property, and liable relatively also to the losses

¹ See *Ex parte Delhase*, 7 Ch. Div. 522, citing *Lind. on Partn.*, 3d ed. p. 19.

resulting from depreciation or death, and yet be simply co-owners, as they very frequently are, and not partners.

On the other hand, one might be a member of a firm, with all the liabilities as such as to third parties, and yet, as between themselves, not be liable to a share of the losses. And it would also be within the power of the members of a firm to agree that, for a certain specified time, one of their number might have no right to a share in the profits, and yet, as between themselves and as to third parties, still be a member of the firm, having his capital in it, and having his rights and powers as to the management of the business, with all his legal remedies as a partner, as before or after the limited specified time in which he was not to receive a share of the profits.¹

Since the case of *Cox v. Hickman* was decided, some confusion has arisen with reference to the principle which has been decided by that case, which renders it necessary, for an accurate statement of the law, that we should examine it still further. In the Irish case of *Shaw v. Galt*,² O'Brien, J., after quoting from the judgments of Lord Wensleydale and Lord Cranworth, in *Cox v. Hickman*, says with reference to those passages: "The principle to be collected from them appears to be, that a partnership, even as to third parties, is not constituted by the mere fact of two or more persons participating or being interested in the net profits of a business; but that the existence of such partnership implies also the existence of such a relation between those persons as that '*each of them is a principal, and each an agent for the others.*'"

This is spoken of approvingly, in *Holme v. Hammond*,³ by two of the judges who sat in the case of *Cox v. Hickman*.⁴ One of them, Martin, B., says: "Lord Wensleydale and Lord Cranworth took part in the judgment, and *it seems to me that the principle on which*

¹ As to whether the partners are principals and agents or not is open to be tested, as was done in *Bullen v. Sharp*, not on the assumed ground that they are partners, but from the facts of the case and the surrounding circumstances, as an agency would be proved in any other case; the holding out as such, etc. If such facts and circumstances show the parties to be partners, with its essential ingredient of principal and agent, then they have the authority and rights of partners, and have to bear the liabilities and responsibilities incident thereto. The old theory that one was a partner who shared the profits was simply reasoning in a circle. If a partner, he shared in the profits, and if he shared in the profits he was a partner, is no better than the exploded sophistry of the old school men who claimed that they knew

the Bible was true because an infallible church said so, and they knew the church was infallible because the Bible said so. It was simply because of the unsatisfactory test in *Waugh v. Carver* and the cases which followed it that involved the whole question in the inextricable confusion which surrounded it, until the law was rescued by *Cox v. Hickman* from the condition into which it had drifted (*Per* Bramwell, B., in *Cox v. Hickman*, L. R. 1 C. P. at p. 129), and was brought back again to the principle from which it had started in the civil law, — "*Contractus societatis, non secus ac contractus mandati.*" Pand. lib. 17, tit. 2, introduction.

² 16 Ir. C. L. R. 357, 375.

³ L. R. 7 Ex. 218, 230.

⁴ *Nom. Hickman v. Cox*, 18 C. B. 617.

their opinions proceeded is correctly stated by O'Brien, J., in the case of Shaw v. Galt." And Bramwell, B., — "*The effect of Cox v. Hickman seems to me excellently stated by O'Brien, J., in Shaw v. Galt.*" With deference, we think quite otherwise. The statement by O'Brien, J., is clearly incorrect as to what the case of Cox v. Hickman, under a strictly correct analysis of it, decides. And, although the words quoted by O'Brien, J., were really used by Lord Wensleydale, following a quotation from Story, that "every partner is an agent of the partnership, and his rights, powers, duties, and obligations are in many respects governed by the same rules and principles as those of an agent; a partner virtually embraces the character of both a principal and agent;"¹ yet the case of Cox v. Hickman does not decide that in every case of a partnership each of the partners is a principal, and "*each an agent for the others,*" and it was not necessary so to hold in Cox v. Hickman in order to decide that case, and was not so holden in and by that case.

Neither, as applicable to the facts in Cox v. Hickman, does the passage quoted convey a correct idea of the general trend of the reasoning of Lords Wensleydale and Cranworth. Thus, by Lord Cranworth, — "I cannot doubt that if the trade was carried on *by those who managed it as* [partners or] *agents* OF THE DEFENDANT, he must be just as liable on the bills as he would have been in an action for the price of the goods supplied. *His* [partners or] *agents* would have the same authority to accept bills in the ordinary course of trade, as to purchase goods on credit."

In this, as in the whole case, the contention pointed to is that the trustees in Cox v. Hickman were *the agents of the creditors for carrying on the business for such creditors, and that the creditors were the principals*. It was not at all contended, nor was it necessary that, for the purposes of the case, it should have been, that the creditors were the agents of the trustees, on the ground that, in *every* partnership "each" of the partners must necessarily be "a principal and each an agent for the other." What the case really holds is very accurately covered by the following strictly sound statement of the law by Lord Cranworth: "Would the creditors have become partners in the concern carried on by the trustees merely because they passively assented to its being carried on upon the terms that the net income, *i. e.* the net profits, should be applied in discharge of their demands? I think not. It was argued that as they would be interested in the profits, therefore they would be partners. But this is a fallacy. It is often said that the test, or one of the tests, whether a person not osten-

¹ Story on Partnership, § 1.

sibly a partner, is nevertheless, in contemplation of law, a partner, is, whether he is entitled to participate in the profits. This, no doubt, is, in general, a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive evidence, that the trade was *carried on in part for, or on behalf of the person setting up such a claim*. But the real ground of the liability is, *that the trade has been carried on by persons acting on his behalf*. When that is the case, he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. *The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on on his behalf, i. e., that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made.*"

This, Lord Cranworth states, and most correctly so, as the ground of the liability of a partner, and this is the one principle decided by *Cox v. Hickman*; which case is far from holding the proposition stated in effect by O'Brien, J., that in order to constitute a partnership, there must, in every case, and necessarily, exist between the parties that relation that "each of them is a principal and *each an agent for the others*." This latter proposition, although *generally* true, which is about all that was intended to be implied by Lords Wensleydale and Cranworth, and by Story, is not invariably true, without exception, and is not held to be so by *Cox v. Hickman*, or by any other well-decided case which has followed that case.¹

¹ It is true that language is used in the case of *Cox v. Hickman*, which, though generally correct, is subject to an exception noticed in the case, and which general language misled O'Brien, J., as to the actual holding in *Cox v. Hickman*. The following is one such passage, which contains language, a portion of which, as is clearly implied in it, is subject to an exception. Lord Cranworth says: "The liability of one partner for the acts of his copartner is in truth the liability of a principal for the acts of his agent. Where two or more persons are engaged as partners in an ordinary trade, each of them has an implied authority from the others to bind all by contracts entered into according to the usual course of business in that trade. Every partner in trade is, for the ordinary purposes of the trade, the agent of his copartners, and all are therefore liable for the ordinary trade contracts

of the others. Partners may stipulate among themselves that some one of them only shall enter into particular contracts, or into any contracts, or that as to certain of their contracts none shall be liable except those by whom they are actually made; but with such private arrangements third persons dealing with the firm *without notice* [without notice, mark] have no concern. The public have a right to assume that every partner has authority from his copartner to bind the whole firm in contracts made according to the ordinary usages of trade. This principle applies not only to persons acting openly and avowedly as partners, but to others who, though not so acting, are by secret or private agreement partners with those who appear ostensibly to the world as the persons carrying on the business."

Here clearly is the implication that parties dealing with a firm with notice of

Kilshaw *v.* Jukes¹ is but a reiteration of the law in *Cox v. Hickman* and *Bullen v. Sharp*, with the additional feature that, in this

those private arrangements are affected by them, and the general tenor of Lord Cranworth's judgment shows clearly that the whole paragraph we have quoted is to be read subject to the exception to which by implication he refers. It was with a misunderstanding of what *Cox v. Hickman* really holds that Cleasby, B., in *Holme v. Hammond*, L. R. 7 Ex. at p. 233, in animadverting on the statement of O'Brien, J., in *Shaw v. Galt*, 16 Ir. C. L. R. 357, said: "Neither does partnership always imply this mutual agency. In the common case of a partnership, where by the terms of the partnership all the capital is supplied by A., and the business is to be carried on by B. and C. in their own names, it being a stipulation in the contract that A. shall not appear in the business or interfere in its management, that he shall neither buy nor sell, nor draw or accept bills, no one would say that, as among themselves, there was any agency of each one for the others." In reply we would observe that *Cox v. Hickman* holds no such doctrine as that there must be an agency of "each one for the others;" but in the case put there would be the agency that was sought to be established in *Cox v. Hickman*, of B. and C. for A., without which there would be no partnership; for to make A. a partner with B. and C. there must be "the fact that the trade has been carried on on his behalf, *i. e.*, that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made." Per Lord Cranworth, in *Cox v. Hickman*, 8 H. L. C. 306. But Cleasby, B., seeing that he has stated the case too broadly, added: "If, indeed, a mere dormant partner were known to be a partner, and the limitation of his authority were not known, he might be able to draw bills and give orders for goods which would bind his copartners; but in the ordinary case this would not be so, and he would not in the slightest degree be in the position of an agent for them. I should, therefore, hesitate very much in acceding to the idea that agency is the foundation of the idea of partnership."

The very exception that a partner cannot bind his copartner in cases where his power has limitations, in contracts with one knowing of such limitations, is of the very essence of the principle of agency itself, and is part of the law of partnership, because, as is stated in the civil law, the contract of partnership is in effect the con-

tract of agency. And even according to the correct decision in *Cox v. Hickman*, as we have pointed out, it is not necessary to show agency on the part of him whom it is sought to charge as a partner; all that is necessary to do is to show that he is a principal, and that the other members of the firm are his agents to carry on the business on his behalf.

Not only is this the clear, simple rule established by *Cox v. Hickman*, but it is a notable fact that in virtually every case where it is sought to charge one who is not an ostensible partner with the liabilities of a partner, it is not on the ground that he has acted as an agent of the others in the business, but that he is the principal, and that the others have acted as his agents "in carrying on the business in his behalf." Thus, in the case of *Cox v. Hickman*, L. R. 8 H. L. C. at p. 284, Lord Blackburn, who had not agreed with the holding that was arrived at in that case, said: "I agree that the question is one of agency, *viz.*, whether the defendants authorized the managers of this firm to bind them." And in *Cox v. Hickman*, 8 H. L. C. at p. 310, he states the case of *Barry v. Nesham*, 3 C. B. 641, thus: "The question was whether the defendant was liable for goods furnished to one Lowthin in the way of his business as the printer and publisher of a newspaper. Nesham had sold the stock and good-will of the paper to Lowthin in consideration of £1500, and on a further stipulation that for seven years the profits were to be applied as follows: that is to say, Lowthin was to have the first £150 of the annual profits, then Nesham was to have them to the extent of £500, if they made so much, and Lowthin was to have all beyond. It is clear that Lowthin was conducting the business for the common benefit of both, subject to their private arrangements as to the shares they should separately be entitled to. Lowthin was, therefore, clearly the agent of Nesham." This, then, was sufficient to establish the partnership; that Lowthin was an agent of his copartner, Nesham, carrying on the business for their common benefit. It was not deemed necessary to establish that Nesham was also acting as agent. His being one of the principals was enough. In another important case, following *Cox v. Hickman*, *Bullen v. Sharp*, L. R. 1 C. P. 86, it was not for a moment contended that the elder Sharp was the agent of the younger, but rather that the younger Sharp, who signed the policy in question

¹ 3 B. & S. 847.

case, while the defendant was to be paid out of the profits, there was an express provision that he was to bear the loss. It was here again held, that the test, whether a person who is not an ostensible partner in a trade, is, nevertheless, in contemplation of law, a partner, is not whether he is entitled to participate in the profits, although this affords cogent, often conclusive evidence of it; but whether the trade has been carried on by persons acting on his behalf.

Wilson v. Whitehead¹ is another case, and decided before Cox v. Hickman, foreshadowing the principle established by the latter case. In Wilson v. Whitehead, A., B., and C. agreed that they should bring out and be jointly interested in a periodical. A. was to be the publisher, and to make and receive general payment. B. was to be the editor, and C. the printer, and, after payment of all expenses, they were to share the work equally. C. was to furnish the paper and charge it to the account at cost prices. No profits were ever made, nor any accounts settled. The plaintiff furnished paper to A. for the purpose of being used by him in printing the periodical. It was held that B. and C. were not liable for the price of it. The ground of the decision, in effect, was the same as that which is established by Cox v. Hickman, and the cases which have followed it.²

by A., was doing so as agent of the elder Sharp, and had this been established it would have been all that was necessary to establish the partnership between the two Sharps. Blackburn, J., in deciding that there was no partnership, referring to the effect of Cox v. Hickman, well states the law thus: "I think that the *ratio decidendi* is that the proposition laid down in Waugh v. Carver, 2 H. Bl. 235, viz., that a participation in the profits of a business does of itself by operation of law constitute a partnership, is not a correct statement of the law of England; but that the true question is, as stated by Lord Cranworth, whether the trade is carried on *on behalf of the person sought to be charged as a partner*, the participation in the profits being a most important element in determining that question, but not being in itself decisive, the test being, in the language of Lord Wensleydale, whether it is such a participation of profits as to constitute *the relation of principal and agent between the person taking the profits and those carrying on the business.*"

Bramwell, B., in the same case also says, — Bullen v. Sharp, L. R. 1 C. P. at p. 127, — "Cox v. Hickman has settled the law, I may be permitted, I hope, to say, in a perfectly satisfactory manner. It is there laid down that the question in such

cases as the present is one of authority, one of agency. Lord Campbell says: 'The defendants can only be liable upon the supposition that the person who wrote the acceptance on the bills of exchange was their mandatary for that purpose.' Lord Wensleydale says: 'And the simple question will be this, whether Haywood was authorized by either of the defendants as a partner in that company to bind him by those acceptances.' Bramwell, B., then says: "The question here is, Was the underwriter's business carried on by persons acting on the defendant's behalf? Now, it certainly was not. The clerk who signed the policy, and the son, acted on the son's behalf." And the decision of the court below that the defendant was liable as a partner was reversed.

¹ 10 M. & W. 503.

² Parke, B., with whom all the others concurred, said: "The question is, did the other defendant authorize Whitehead to purchase the paper on their account, or on his own? It appears to me, on the true construction of the contract, that the latter was the case." In other words, C. was not the agent of A. and B., to bind them as principals, the purchase of the paper being made on his own account, and not on their behalf. See, also, Nicholson v. Ricketts, 2 El. & El. 497,

The principle of *Cox v. Hickman* was applied to an assurance society in *Re English and Irish Church and University Society*,¹ where it was sought to hold policy-holders liable as partners for the general liabilities of the society, because they participated in its profit and, incidentally, in its loss. In holding that they were not so liable, Wood, V. C., said: "The question for the general creditors is how far they can constitute these persons partners, liable to them for the debts of the company; and it is material to inquire how far the creditors can be supposed to have given credit to the policy-holders as members of the partnership. You have here a joint-stock company registered under provisions with which the assured have nothing to do, and empowered to carry on the business upon registration being properly effected, with a list of members, to whom and to whom alone, unquestionably, the public, the creditors, give credit; and, therefore, there being no ground for inferring an ostensible partnership, all that remains is to determine whether persons who in fact gave no credit to these policy-holders, can, on the theory of dormant partnership, insist upon holding them liable on the ground of their

and an old New Brunswick Case, *McPherson v. Haskins*, 1 Kerr, 430, where very much the same principle is acted on. But see a very badly decided case in New Brunswick, *Jones v. Foster*, 12 N. B. R. 607 (decided since *Cox v. Hickman*), where Ritchie, C. J., delivering the judgment of the whole court, rested under the delusion, as laid down in the case of *Heyhoe v. Burge*, 9 C. B. 458, which he cited, that, "It has been decided in so many cases that an agreement between the parties to be jointly interested in the profit of one transaction constitutes a partnership and authorizes them to do all that is necessary to obtain profits, as usual in such matters, that the rule cannot now be shaken." This, of course, is a complete fallacy. The contention of the defendants' counsel in the case, not very accurately reported, that where the agency of a purchaser of goods was strictly limited and defined, in an agreement of partnership for a single or special transaction, as his position was that of a special agent merely, he could not, as such, go beyond the limits of the authority that was conferred upon him, so as to bind his principal for purchases not authorized by the agreement. The principle which really governed *Jones v. Foster*, 12 N. B. R. 607, on the facts of that case, is, as laid down in *Ex parte The Darlington and Stockton Banking Co.*, 11 Jur. N. s. 122, by Lord Westbury, thus: "Generally speaking, a partner has full authority to deal with the partnership property for partnership pur-

poses. If the business of the partnership be such as ordinarily requires bills of exchange, then, unless restrained by agreement, any one partner may draw, accept, and indorse bills of exchange in the name of the partnership for partnership purposes. All persons may give credit to his acts and his authority, unless they have notice, or reason to believe, that the thing done in the partnership name is done for the private purposes, or on the separate account of the partner. In that case, authority by virtue of the partnership contract ceases; and the person dealing with the individual partner is bound to inquire and ascertain the extent of his authority; otherwise he must depend on the right and title of the partner, or on circumstances sufficient to repel the presumption of fraud. These principles have been established by a long series of decisions, — if, indeed, decisions were at all required to show the proper application of the rule of law, which is so plain and obvious as that which results from the ordinary law of agency, as applied to partnerships." The doctrine now established being that of agency, as intimated before by us in this Part, the doctrines of general and special agency are respectively applicable to general and special partnerships. See, besides the previous cases cited in this Part, *Smith v. Craven*, 1 Cr. & J. 500; *Donnally v. Ryan*, 2 Am. Law Reg. N. s. 312; *Heap v. Dobson*, 15 C. B. N. s. 460.

¹ 1 H. & M. 85.

participation in the profits. On the principle of *Cox v. Hickman* I must hold that they cannot, and that these policy-holders still remain creditors no less than the holders of ordinary policies."

The same principle was acted on by the Privy Council in *Mollwo v. The Court of Wards*,¹ where it was held that, having regard to the restrictions and modifications made of late in the rule of law formerly prevailing, that participation in the net proceeds of a business made the participant liable as a partner to third parties, where the whole scope of the agreement shows that the primary object was to give the participant security as a creditor of the ostensible partners, contracting to give him a participation in the net profits was not sufficient to make him liable as a partner to third parties; the relation of principal and agent not having been shown to exist between the participant and the ostensible partners. And, further, where a man holds himself out as a partner, or allows others to do so, he is then estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. He is then held liable as a partner by estoppel; or, whenever the agreement between parties creates a relation which is in substance a partnership, no mere words or declarations to the contrary will prevent, as regards third persons, the consequences flowing from the real contract. And although a right to participate in the profits of a trade is an important incident of a partnership, so that there may be cases where, from such participation alone, it may, as a presumption, not of law but of fact, be inferred; yet, whether that relation does or does not exist must depend on the real intention and contract of the parties.

The effect of *Cox v. Hickman* is to put on an intelligible basis the old cases, where clerks who were to receive a share of the profits in lieu of wages, or seamen who were to receive a portion of the profits of whaling voyages, were held not to be partners. The relation in such cases is simply that of master and servant; not of principal and agent. The case of *Ross v. Parkyns*,² where the plaintiff was to carry on the underwriting business in the name of the defendant, and was to receive a share of the profits, was decided on the same ground; viz., that the business was that of the defendant, and that the plaintiff in carrying on the business was doing so simply as the servant, not as the agent, of the defendant, so as to constitute a partnership between them.³

¹ L. R. 4 P. C. 419.

² L. R. 20 Eq. 331.

³ See, also, a somewhat similar case, *Ex parte Tennant*, 6 Ch. Div. 303. In this case, Cotton, L. J., explains the mean-

ing of Lord Cranworth, in *Cox v. Hickman*, where he uses the term "on behalf," as not thereby referring to a mere right to share in the profits, but that he meant to speak of the acting of one partner for the

*Moore v. Davis*¹ was decided on the principle to which we have previously referred, that where the contract between the parties shows that it was the intention to form a partnership, and that a partnership, in fact, has been created, the legal effects will follow, even though they may have expressly declared that they shall not be considered partners. There, an agreement in reference to a building speculation upon the S. estate, bought with the money of A., provided that B., in consideration of his services to enable A. to realize the estate, should be paid one-half of the profits after A. had made certain payments; that B. should bring in a third of certain fees which he might receive from builders, and bear one-half of any losses, and generally it was agreed that he should receive and bear one-half of the profits and losses upon the whole transaction; but the agreement was not in any way to be construed into a partnership between the parties, *and should wholly and solely relate to the S. estate*. B.'s services were to be the consideration for the agreement, and he was not to charge for his time and trouble, but only for actual disbursements made by him for the benefit of the estate, and for realizing it for A. and B.'s mutual benefit. The court held that if the words "only and solely relate to the above estate" had been left out, there would not have been a partnership, but, as the words would be unmeaning if a partnership were negatived by the use of them, the agreement constituted the parties a partnership only and solely relating to the above estate, and not a general partnership.

In *Pawsey v. Armstrong*,² Kay, J., held, that an agreement for sharing profit and loss in certain proportions confers all the rights of partnership *inter se*. In this case, Kay, J.,³ states that he had asked for any authority to show that where two persons agreed to divide the profit and loss of a business in certain defined shares, they have been held not to be partners. We have already, in this Part, referred to various classes of cases where the mere participation in profits and in the bearing of losses, does not constitute the parties partners; and now, in *Walker v. Hirsch*,⁴ in the English Court of Appeal (where *Pawsey v. Armstrong* was disapproved), thus presenting another case in response to the demand of Kay, J., it was decided that although the plaintiff was to receive one-eighth share of the net profits, and bear one-eighth share of the losses, this did not, of itself, constitute the parties partners *inter se*; but that, on the proper construction of the agreement, the plaintiff was in the position of a ser-

other, when one partner is the agent of the partnership, and the agent, therefore, of his co-partner. *Ibid.* at p. 317.

¹ 11 Ch. Div. 261.

² 18 Ch. Div. 698.

³ At p. 704.

⁴ 27 Ch. Div. 460.

vant, and that therefore, he had not the right of a partner, as against the defendant, to an injunction and receiver.¹

Part-owners of ships, too, share in profits and losses in definite proportions, and yet are not partners; the essence of the partnership relation of principal and agent not existing. The distinction between such an ownership and a partnership, in the consequence or result, is marked; each partner being liable *in solido* for the obligations of the firm, while it is generally held, as regards part-owners of ships, that no such liability exists.²

THE ENGLISH PARTNERSHIP AMENDMENT ACT.

The English Partnership Amendment Act of 1865, generally known as Bovill's Act, which act we state in a note below,³ is

¹ See *Syers v. Syers*, 1 App. Cas. 174, where, under a different state of facts, the parties were held to be partners.

² See the following cases in which the different kinds of interest are considered, *Graves v. Sawer*, T. Rym. 15; *Ec parte Young*, 2 Ves. & B. 242; *Ec parte Harrison*, 2 Rose, 76; *Owstans v. Ogle*, 13 East, 538; *Helme v. Smith*, 7 Bing. 709; *Rex v. Collector of Customs*, 2 Mau. & S. 223; *Green v. Briggs*, 6 Hure, 395; *Bulkley v. Barber*, 6 Ex. 164; *Mumford v. Nicoll*, 20 Johns. 611; *Thorndike v. De Wolf*, 6 Pick. 120; *French v. Price*, 24 Pick. 13; *Jackson v. Robinson*, 3 Mas. 138; *Hopkins v. Forsyth*, 14 Pa. 38; *Lamb v. Durant*, 12 Mass. 54; *Merrill v. Bartlett*, 6 Pick. 46; *Harding v. Foxcroft*, 6 Greenl. 76; *Patterson v. Chalmers*, 7 B. Mon. 595, 598; *Milburn v. Guyther*, 8 Gill, 92; *Macey v. De Wolf*, 3 Woodb. & M. 193, 205; *Knox v. Campbell*, 1 Pa. 366; *Buddington v. Stewart*, 14 Conn. 404; *Revens v. Davis*, 2 Paine, C. C. 202; *Phillips v. Purington*, 15 Me. 425; *Seabrook v. Rose*, 2 Hill, Ch. 553. Shareholders in companies, too, participate in definite proportions of profit and loss, but their rights and liabilities are essentially different from those of partners. The more thoroughly the question is examined, the more satisfactory the principle laid down by Pothier in the civil law, and established by *Cox v. Hickman*, 8 H. L. C. 268, is found to be.

³ By the Act of 28 & 29 Vic. c. 86 (An Act to Amend the Law of Partnership), it was enacted that a loan of money by a person on a contract to receive a share of the profits, or a contract for remuneration of a servant or agent by a share of profits, or the receipt of certain annuities out of profits, should not make those parties, respectively, responsible as partners. In *Holme v. Hammond*, L. R. 7 Ex. 218, 223,

it was claimed that this act was a recognition, that, notwithstanding *Cox v. Hickman*, the law before the passage of the act was contrary to what it became after the act was passed. Kelly, C. B., considered that the effect of the statute was merely that, as respects the protected classes, the sharing in profits should be no evidence at all of a contract of partnership, but, with regard to others, it was evidence, though insufficient of itself to establish the liability. *Ibid.* 227. Bramwell, B., says: "It is asked, if the defendants are not liable, what was the use of the 28 & 29 Vic. c. 86? If I say none, it would only show that the act was useless. In truth it was passed before *Cox v. Hickman* was understood." In *Mollwo v. The Court of Wards*, 4 Ap. Cas. at p. 437, the Privy Council say: "Some reliance was placed on the statute, 28 & 29 Vic. 86, § 1, which enacts, that the advance money to a firm upon a contract that the lender shall receive a rate of interest varying with the profits, or a share of the profits, shall not, of itself, constitute the lender a partner, or render him responsible as such. It was argued, that this raised an implication that the lender was so responsible by the law existing before the passing of the act. The enactment is no doubt entitled to great weight as evidence of the law, but it is by no means conclusive; and when the existing law is shown to be different from that which the legislature supposed it to be, the implication arising from the statute cannot operate as a negation of its existence." As a better explanation we would suggest that the act is little more than declaratory or an affirmation of the common law. The last clause, providing that the word "person" in the act "shall include a partnership firm, a joint-stock company, and a corporation," is usually,

little more than a declaration or affirmation of the common law. Hence, it virtually leaves the question as to whether parties are partners in business transactions as it was before the passage of the act; the act not changing, to the slightest extent, the principles of the law as regards the ascertaining whether parties are partners or not. The question is still one as to the creation of agency; as to whether one has the power of binding another as principal in the alleged partnership transactions.

*Pooley v. Driver*¹ is a case under that act, which decides that the first section of the act does not apply to any contract unless the advance of money under it would, independently of the act, have created the relation of debtor and creditor as distinguished from the relation of partners. In this case, Jessel, M. R., is "almost sorry" that the word "agency" has been introduced into the question of partnership. We are not at all inclined to share his regrets. The effect has been to establish a clear, well-defined rule, instead of the hazy, shifting views that were entertained before the rule was clearly established by *Cox v. Hickman*.² He says: "Of course everybody knows that partnership is a sort of agency, but a very peculiar one. You cannot grasp the notion

in similar statutes, so construed at common law. See Pars. on Partn. 93. So, long before *Cox v. Hickman* was decided, it was held in many cases, covering those of clerks, whaling-seamen, &c., that a contract for the remuneration of a servant, engaged in any trade or undertaking, by a share of the profits of such trade or undertaking, did not, of itself, render such servant responsible as a partner therein, nor give him the rights of a partner; so the second section of the act, making a provision to that effect, is clearly but declaratory of the well-known common-law rule in the matter. All the other sections of the act, except the fifth, were, at the time of the passage of the act, established as common-law principles. The only new provision is that in the fifth section, which gives the other creditors of an insolvent debtor priority over the sharers in the profits as remuneration for money borrowed by the debtor, or in payment for a good-will purchased by him. It is therefore a fair presumption that the act was more particularly intended to establish the law as in the fifth section; the rest of the act being simply established common-law principles. Professor Parsons was of that opinion. In his work on Partnership, p. 93, he says: "We will add our hope, and our belief, that the courts of this country will regard this statute rather as declaratory of the law merchant in respect to partner-

ships, than as changing that law; and will apply to cases which come before them the principles on which the statute is founded." Of course these remarks were not intended to be applied to the fifth section of the act, which is purely legislative. Very many English statutes have been enacted in that way, being simply declaratory or an affirmation of the common law. Thus, the greater part of the 25 Edw. 3 is. And by *The Mirror*, cap. 1, § 5, and Britton, c. 23, fo. 43, the act declaring the violations of the queen regnant to be treason, was so; and so, also, according to Bracton, *The Mirror*, Britton, Fleta, and Glanville, was the Statute of Treasons. Hale, in his *Hist. of the Com. Law*, 9, 49, enumerates the statutes of Magna Charta, cap. 29; 5 Edw. 3, c. 9; 25 Edw. 3, c. 4; 27 Edw. 3, c. 17, and many other statutes of Hen. 3, and Edw. 1 and 2, as having been "made but in affirmance of the common law;" and such has been repeatedly the case in later statutes. So, it is no new thing. See, further, *Co. Inst.* 3 d. 16; Fleta, l. 1. c. 22; *John De Brittain's Case*, 20 Ed. 1, n. 2; 3 Inst. 65; *Reeves' Hist. of Eng. Law*, 215. And see an article on the Origin and History of the Common Law, by the author of this work, in 6 *Am. Law Reg.* x. s. 65 *et seq.*

¹ 5 Ch. Div. 458.

² 8 H. L. C. 268.

of agency properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners; a notion which was well grasped by the old Roman lawyers, and which was partly understood in the courts of equity before it was a part of the whole law of the land as it is now. But when you get that idea clearly you will see at once what sort of agency it is. It is the one person acting on behalf of the firm. He does not act as agent, in the ordinary sense of the word, for the others, so as to bind the others. He acts on behalf of the firm of which they are members; and as he binds the firm and acts on the part of the firm, he is properly treated as the agent of the firm. If you cannot grasp the notion of a separate entity for the firm, then you are reduced to this, that inasmuch as he acts partly for himself and partly for the others, to the extent that he acts for the others he must be an agent; and in that way you get him to be an agent for the other partners, but only in that way, because you insist upon ignoring the existence of the firm as a separate entity."

This is a refining distinction which we think is of little value. The fact whether one, not an ostensible partner, is a partner or not, is simply to be ascertained by inquiring whether the business which is carried on is carried on by the parties, on his behalf as principal, — such relation to be ascertained by the facts of the case and the surrounding circumstances, the sharing of profits being one ingredient, but not a conclusive one, — to show the relation of principal and agent. In this case, it was held that that was the relation, and that the relation was not that of debtor and creditor. In other cases, the surrounding circumstances show conclusively that the relation is not that of partners; not of that kind of agency with profits which constitutes a partnership, but simply the relation of master and servant, even though the element of profits is superadded. Notwithstanding the refined distinctions of Jessel, M. R., it is obvious that this really was his own view;¹ and it is exactly what the case itself holds, affirming as it does that the relation between the parties was not that of debtor and creditor, but of principal and agent, and that, therefore, a partnership existed; the other parties carrying on the business on behalf of the defendant as a principal in the firm, and not as his creditors. The relation of principal and agent is to be ascertained in a partnership, with the factor of a right to participate in the profits and a liability for the losses superadded, exactly as the relation of principal and agent has to be ascertained in any other case.

Another case under the act, *Ex parte Delhasse*,² holds with

¹ See *Ibid.* 476 at top of page.

² 7 Ch. Div. 511.

reference to the act precisely the same doctrine as *Pooley v. Driver*.¹ It was there held, quite in accordance with the general law of agency, as applicable to partnership, that though an agreement is expressed to be an agreement for a loan to a partnership under the act, and contains a declaration that the lender shall not be a partner, he will, nevertheless, be a partner if the result of the agreement, fairly construed as a whole, independently of the act and the declaration, is to give him the rights and impose on him the obligations of a partner. Bacon, C. J., whose judgment was affirmed on appeal, decided the case on the ground that the case of *Cox v. Hickman*² has established the principle that the relation of principal and agent must be made out before the dormant partner, or the person lending his money, can be held liable for the debts contracted in the business. James, L. J., put the matter on a clear, intelligible basis; thus: "The loan is a mere pretence, the object being to enable the so-called lender to be not only a dormant partner, but the real and substantial owner of the business, *for whom and on whose behalf it is to be carried on*, and yet to provide that he shall not be liable for the loss, in case loss shall be incurred. In my view, it is the same thing as if B. were to set up a business to be carried on by A., he being nothing but a manager, B. being the real principal, although A. was buying and selling everything, and then, when the public found out who the principal was when the thing came to an end, he could say A. is the man you trusted. I was the real principal, but I am not liable, although the whole thing was mine from beginning to end. The law of England does not allow this to be done, and it appears to me that it equally does not allow a man to escape liability who, though he is not the entire owner, yet is the substantial owner of a business, but takes in two persons as nominal partners to carry on the business, while it is in truth his business during the whole time." We think this is a clear and accurate view and exposition of the law.

3. APPLICATION OF AGENCY RULES TO PARTNERSHIPS.

The principles we have discussed so fully in our notes in this Part are, in connection with the contract of Sales, second only in importance to their connection with partnership itself; for the mass of partnerships are trading firms, the business of which mainly consists of buying and selling. From the thoroughly well established rule in *Cox v. Hickman*,³ the very essence of a part-

¹ 5 Ch. Div. 458.

³ 8 H. L. C. 268.

² 8 H. L. C. 268.

nership is the relationship, in carrying on the business, of principal and agent between the parties. Hence it follows that partners being nothing else than principals and agents, constituting firms to carry on business for their mutual interest, the rules of agency apply to them precisely as they do to any other persons occupying the relative positions of principal and agent. We know of no well-decided case where this question has been squarely brought up; but the cases are numerous, both before and since *Cox v. Hickman* was decided, where the principles are acted on.

One important principle is as to general and special agency. The rule of agency is that in general agency the principal will be bound by the acts of his agent within the scope of the general authority conferred on him, although he violates by those acts his private instructions and directions, which are given to him by the principal, limiting, qualifying, suspending, or prohibiting the exercise of such authority under particular circumstances.¹ But, with a special agent, if the agent exceeds the special and limited authority conferred on him, the principal is not bound by his acts, but they become mere nullities, as far as the principal is concerned, unless, indeed, he has held him out as possessing a more enlarged authority.²

So, also, it is evident, on principle, that the same rules of evidence applying to the appointment and powers of an agent apply equally as well to the creation and powers of a partner. The same rules apply to both. Where there is a holding out of one as an agent, the principal is liable; so, where there is the holding out of one as a partner, the other is liable as a partner; as a prin-

¹ Story on Agency, § 126; *Duke of Beaufort v. Neeld*, 12 Cl. & F. 248, 273; *Nickson v. Brohan*, 10 Mod. 109; *Allen v. Ogden*, 1 Wash. C. C. 174; *Bryant v. Moore*, 26 Me. 84; *Fitzsimmons v. Joslin*, 21 Vt. 129. So, in a general partnership, each partner is held out to the public as the general agent of the partnership, and consequently his acts will bind it, notwithstanding he may have violated his private instructions or the express terms of the secret articles of partnership. *Sandilands v. Marsh*, 2 B. & Ald. 673; *United States Bank v. Binney*, 5 Mason, 176; 5 Pet. 529.

² *Fleming v. Hector*, 2 M. & W. 178; *Todd v. Emly*, 7 M. & W. 427; 8 M. & W. 505; *East India Co. v. Hensley*, 1 Esp. 111; *Woodin v. Burford*, 2 Cr. & M. 391; *Jordan v. Norton*, 4 M. & W. 155; *Sykes v. Gylas*, *Id.* 645; *Waters v. Brogden*, 1 Y. & J. 457; *Daniel v. Adams*, Ambl. 495; *Munn v. Commission Co.*, 15 Johns. 44, 54; *Rossiter v. Rossiter*, 8 Wend. 494; *Andrews v. Kneeland*, 6 Cow. 354; *Brown v. Trantrum*, 6 Mill.

(La.) 47; *Beals v. Allen*, 18 Johns. 363; *Hatch v. Taylor*, 10 N. H. 538; *Allen v. Ogden*, 1 Wash. C. C. 174. Smith, in his Merc. Law, 172, says: "A general agent is a person whom a man puts in his place to transact all his business of a particular kind. Thus a man usually retains a factor to buy and sell all goods, and a broker to negotiate all contracts of a certain description; an attorney to transact all his legal business; a master to perform all things relating to the usual employment of his ship; and so in other instances. The authority of such an agent to perform all things usual in the line of business in which he is employed cannot be limited by any private order or direction not known to the party dealing with him. But the rule is directly the reverse concerning a particular agent; *i. e.*, an agent employed specially in one single transaction; for it is the duty of the party dealing with such an one to ascertain the extent of his authority; and if he does not, he must abide the consequences."

principal for the acts of his agent, within the scope of the agency. But when the authority of the agent is in writing, and it is necessary to prove such authority by writing, the writing must be produced and proved; and if, from the nature of the transaction, the authority must have been in writing, parol evidence will not be admissible to prove it unless as secondary evidence after proof of the loss of the original. And, therefore, on the same principle, the statements or declarations of the alleged agent are not evidence as against the alleged principal of the existence of the agency.¹ The same doctrine, on principle, unquestionably applies to a partnership.²

¹ Declarations of the agent to third parties, stating his agency and its scope, are not competent evidence to prove the existence or scope of the agency. Nor are his acts done without the knowledge or authority of the alleged principal, and not ratified subsequently by him, evidence of the agency. Gr. on Ev. p. 53; Whiting v. Lake, 91 Pa. St. 349; Reynolds v. Continental Insurance Co., 36 Mich. 131. As the rule admitting the declarations of the agent is founded upon his legal identity with the principal, they bind only as far as the agent had authority to make them. Tay. on Ev. § 605; Fausett v. Fausett, L. R. 7 Ec. & M. 93-95; Hogg v. Garrett, 12 Ir. Eq. R. 559. These principles are well laid down by Sir William Grant, in Fairlie v. Hastings, 12 Ves. 126, thus: "As a general proposition, what one man says, not upon oath, cannot be evidence against another man. The exception must arise out of some peculiarity of situation, coupled with the declarations made by one. An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement, and in many cases by his acts. What the agent has said may be what constitutes the agreement of the principal, or the representations or statements made may be the foundation of, or the inducement to, the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove the agent did make that statement or representation. So, with regard to acts done, the words with which those acts are accompanied frequently tend to determine their quality. The party, therefore, to be bound by the act, must be affected by the words. But except in one or the other of those ways, I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it, though it may have some relation to the business in which the person making that assertion was employed as agent. For instance, if

it was a material fact that there was the bond of the defendant in the hands of A., that fact would not be proved by the assertion that A., an agent, had said there was: for this is no fact; that is, no part of any agreement which A. is making, or of any statement he is making as inducement to an agreement. It is mere narration, — communication to the witness in the course of conversation, — and, therefore, could not be evidence of the existence of the fact. The admission of an agent cannot be assimilated to the admission of the principal. A party is bound by his own admission, and is not permitted to contradict it. But it is impossible to say a man is precluded from questioning or contradicting anything a person has asserted as to him, — *as to his conduct or his agreement*, — merely because that person has been an agent of his. If any fact, material to the interest of either party, rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion." Carrying out this doctrine, Lord Kenyon, in *Maesters v. Abraham*, 1 Esp. 375, refused to admit an agent's letter containing a statement of what he had done for his principal; holding that such facts must be proved by himself, not by his statement of them in a letter. See *Bauerman v. Radenius*, 7 T. R. 663; *Bank of Scotland v. Watson*, 1 Dow. 40, 45; *East India Co. v. Hensley*, 1 Esp. 112; *Daniel v. Adams*, Anbl. 498; *Howard v. Braithwaite*, 1 Ves. & B. 209; *Fenn v. Harrison*, 3 T. R. 760; 4 T. R. 177. As the creation of an agency and the formation of a partnership are both contracts, and as a contract is an agreement between two or more parties to do or not to do some particular thing; so, for the formation of a partnership, as well as for the creation of an agency, the "agreement" of the parties, expressly or impliedly, must, in both cases alike, be shown.

² In the New Brunswick case to which we have referred in a previous note

4. PARTNERSHIP PURCHASES AND SALES.

A large proportion of the cases which we have examined in this Part are cases which have arisen out of purchases by partners, or

to this Part (*Jones v. Foster*, 12 N. B. R. 607, see *ante*, p. 479, *n.*), all these principles were disregarded and contravened. We examine that case more fully in this note, after having first examined some other authorities. The case of *Denny v. Cabot*, 6 Mete. 82, is, as to the facts, as applicable to the matter we are considering, very much the same as *Jones v. Foster*, *supra*. One Cooper had leased a woollen mill in Milford, and agreed with the defendants, of Boston, to manufacture wool for them, — the stock to be delivered to him at his mill, and he to deliver the manufactured goods to the defendants at Boston. He was to be paid a fixed sum per yard for manufacturing the goods, and in addition was to receive one-third of the net profits on the business, the defendants charging all expenses, interest, etc., and a commission and guaranty on gross sales of six per cent. Cooper bought dye-stuffs, etc., from the plaintiffs, showing them his agreement with the defendants, and stating to the plaintiffs that the defendants would accept his drafts for payment. All the articles supplied by the plaintiffs to Cooper under this sale were used by Cooper in the manufacture of the defendants' goods, the goods as manufactured being sent to the defendants. After delivery of the dye-stuffs, etc., to Cooper, he drew a draft on the defendants in favor of the plaintiffs, which was refused acceptance. Previously to Cooper's application to the plaintiffs for the goods, he had failed, owing the plaintiffs, who had lost their debt, he having no property, and being discharged in insolvency. After obtaining these supplies, Cooper manufactured no goods, except under his agreement with the defendants. Having again failed, an action was brought against the defendants for payment for the supplies. The court held that the defendants were not liable, the facts not constituting them partners with Cooper. The case was decided on the basis of the old, airy distinction made in many of the old cases; disapproved by Lord Eldon, and condemned in *Cox v. Hickman*, 8 H. L. C. 268.

Now, under the principles decided by that case and the others following it, it would be perfectly clear, under the rules of evidence applicable to agency, and to partnership as embodying agency, that, even admitting that the agreement between Cooper and the defendants constituted them partners, it was simply a special, limited partnership, and there-

fore was but a special, limited agency; and thence the laws of evidence relating to a special, limited agency were equally applicable to a special, limited partnership. On this principle the decision in the case would be simplicity itself. By the agreement, Cooper neither expressly nor impliedly was the agent of the defendants to buy the dye-stuffs for them, "on their behalf," as principals in the matter. A clear test, with reference thereto, is supplied in the fact that there was nothing, by virtue of the contract, to cause a property in the dye-stuffs, before their use, to vest in the defendants, it being quite in Cooper's power to exchange them for other dye-stuffs, or to use them in any other mill, or in the manufacturing of any other goods, without any right on the part of the defendants to object to such an use. This was the ground upon which a case to which we have previously referred in this Part (*Wilson v. Whitehead*, 10 M. & W. 503) was decided. This case is expressly put on the ground of "authority;" that is, agency. Here A., B., and C. agreed that they should bring out and be jointly interested in a periodical publication. A. was to be the publisher, and to make and receive general payments; B. to be the editor, and C. the printer; and after payment of all expenses, they were to share the profits of the work equally. C. was to furnish the paper, and charge it to the account at cost prices. The paper was delivered by the plaintiffs to the defendant, A., who carried on business in the name of "A. & Co.," for the purpose of being used by him in printing the periodical jointly owned by A., B., & C. Lord Abinger held, on the trial, that B. and C. were not jointly liable with A. for the price of the paper, and nonsuited the plaintiffs. On motion, pursuant to leave, the court unanimously sustained the nonsuit. Parke, B., said: "The question is, did the other defendants authorize A. to purchase the paper on their account or on his own? It appears to me, on the true construction of the contract, that the latter was the case. When the paper was in his possession he was at liberty to have appropriated it to any other purpose. This is very much like the ordinary case of coach proprietors, where each horse the coach for one or more stages, and each agrees to bring into the concern the work and labor of his horses, and none of the others has any interest in them, though all

those who were claimed to be such, or of sales to them. The leading and now celebrated case of *Cox v. Hickman*¹ was one

share in the profits." Counsel: "Those cases proceed on the ground that it is notorious to all that each does so work with his own horses." Parke, B.: "Not at all; *but on the ground that such is the authority given.*" The question was thus treated in effect as to the nature of the agency that was created by the partnership agreement.

The case to which we have previously referred (*Jones v. Foster*, 12 N. B. R. 607, in which Ritchie, C. J., delivers the judgment of the whole court), not only contravenes the principles named by us in the text; is in opposition, in principle, not only to the two cases above named, and to a great number of other well-decided cases, but is so utterly unsound as to be palpably absurd. The facts were that D., in New Brunswick, the survivor of the firm of M. & D., continued for several years after the death of his partner to carry on the business of purchasing and shipping shingles, in the old firm name of M. & D., and was in the habit of purchasing goods on credit from the plaintiff and others; the account, all this time, in the plaintiff's books being kept against "M. & D." The defendants, F. & S., were merchants, carrying on a lumber and general commission business in Boston, and, in the fall of 1866, an agreement was entered into between F. & S. and D. (in the name of M. & D.), and one B. The agreement, which was in writing, after reciting that the parties had agreed to enter upon an operation for "the purchase and selling of shingles," upon the terms thereafter mentioned, provided that M. & D. were to attend to the necessary assorting, piling, and re-shipping all shingles and clapboards, and were "to receive for their services all expenses on account of same, including wharfage," at a named rate. B. was to devote his time "in purchasing shingles and clapboards;" and F. & S. were to make and control the sales; to receive a commission on the sales, and actual expenses incurred by them. The lumber purchased under the agreement was declared to be "joint property of, and as purchased for F. & S. and M. & D." The capital was to be furnished "equally by M. & D. and F. & S.," on which interest was to be charged. Profit or loss was to be equally divided, one-third to M. & D., one-third to F. & S., and one-third to B. The business was carried on until July, 1867; D., in the meantime, carrying on other business in shingles and clapboards in the

same name of M. & D. At the time of entering into the agreement D. was really worth little or nothing, and put virtually nothing into the business except such goods as he had bought from the plaintiff and others, in his old firm name of M. & D.; as he had previously been in the habit of buying. The plaintiff had dealt with D. for several years before this agreement was made, and in *January*, 1867, D.'s indebtedness to him was large. F. & S. advanced for the purposes of purchasing shingles and clapboards under the agreement, to the extent of about \$100,000 more than the product of the lumber that they received. In July, 1867, claiming that D. was improperly disposing of the shingles and clapboards, F. & S. obtained an injunction restraining him from doing so. D. was then in insolvent circumstances, being indebted to the plaintiff and others for goods, and owing F. & S. in excess of all the lumber shipped by him to them, about \$100,000. In drawing on F. & S. for money, D. did so in his old firm name of M. & D., as he did in drawing on others. The accounts kept in F. & S.'s books were headed "M. & D., Joint Account," and, before the agreement was made, the account in their books was headed "M. & D." In June, 1867, D. gave the plaintiff notes for \$1,302.44, for the balance then due him. The notes were given in his old firm name of M. & D. When they fell due they were dishonored, and subsequently a suit was brought in New Brunswick by the plaintiff against F. & S. and D.; the latter of whom allowed judgment to go against him by default. On the trial, to prove the partnership, the written agreement was put in evidence; and then, against the objections of the counsel of F. & S., that there was no evidence of F. & S. having held themselves out as partners with D., or as being members of the firm of M. & D.; that the partnership agreement showed no agency in D. to bind F. & S. for goods, which he had bought and supplied as a portion of his part of the capital, and no authority whatever shown from F. & S. to D. to make notes in the name of M. & D. to bind them; the plaintiff was allowed by the presiding judge (Allen, J.), to give in evidence that he went in *January*, 1867 (at which time, mark, "*D.'s indebtedness to him was large*"), and saw D., who told him (!) of the partnership between him and F. & S., and said he should want some goods: that principally all the business he was doing on the river was a

within this class of cases. There, debtors in embarrassed circumstances assigned their property to trustees, for the benefit of cred-

joint business with F. & S.; that A., an outside person, knew all about the business between them, and he referred him to A. The plaintiff then went to A., who told him (!) that there was a partnership between F. & S. and D.; that they were buying and shipping lumber, and he believed they were perfectly good. The plaintiff did not ask the particulars of the agreement, and A. did not inform him. The plaintiff stated that from this information *and other causes* he was led to make *further advances of goods* to D. There was no change in his books, the goods being charged to M. & D., because, the plaintiff said, he *understood* the business was carried on in that name.

It is only necessary to name these facts to show how monstrously the rules of evidence were violated. But still worse, after he had put in the written agreement to prove the partnership, the plaintiff, again against objection, called D.,—who was then in antagonism to F. & S.,—who “states” that, *a month before the agreement was entered into* “it was agreed that the three defendants and one B. *should enter into an agreement* relative to the *buying and shipping of lumber.*” “D. *states* that the business was to be carried on,” in effect, in contravention of the whole tenor of the proved written agreement; making F. & S. really general partners in the firm of M. & D.; and, still worse, stating in effect that they were to furnish, not one-half the capital for the “purchase” of the shingles,—not for the purchase by D. for goods to be used by him as he pleased, as A. could have done in the analogous case of *Wilson v. Whitehead*, 10 M. & W. 503, stated *supra*,—but, in effect, the entire capital, for their own half, and for D.’s half as well. The charge was in accordance with all of this improperly received evidence, and was, in effect, that there was a partnership under the agreement which gave D. power to bind F. & S. *for goods purchased by him* for the purpose of getting out shingles on joint account; that it was immaterial whether F. & S. had contributed more than their share of the capital or not; and that D. had a right to bind F. & S. *by drawing joint notes and bills in the name of M. & D. for the goods bought from plaintiff* (many of which were bought before the agreement was made), if F. & S. had recognized notes and bills drawn in that name. Of this last, which is most disingenuously put, there wasn’t a tittle of evidence except that F. & S. accepted and paid M. & D.’s drafts on them to furnish

their share of the capital. The jury, under this evidence and charge, having found for the plaintiff, the defendants moved for a trial on the grounds of the improper reception of evidence, misdirection in the charge, and verdict against the weight of evidence. The position was taken, under *Cox v. Hickman*, 8 H. L. C. 268; *Bullen v. Sharp*, 12 Jur. N. S. 247, and other cases following them, that, D.’s agency being limited and strictly defined by the agreement, he was in a position of a special agent merely, and had no power to bind F. & S. beyond the scope of the agency, and that all the evidence in which an attempt was made to enlarge the agency was wrongly received. The verdict was sustained by the court, on a principle that would quite as much have made D. liable to the bankers of F. & S. for moneys they might have obtained for their share of the capital, as to have made F. & S. liable on D.’s own notes, for goods purchased by him as the only and small contribution made by him towards his share of the capital.

The case furnishes a fair exemplification of the effect of the reliance upon the old fallacy that the right to share in the profits constitutes a partnership. It was simply the wrong application of this old doctrine that led to the sustaining of all the improperly received evidence, and inaccuracies in the charge in this case; the court improperly laying down as a general principle, a statement made by Cresswell, J., in *Heyt v. Burge*, 9 C. B. 458, before the sound rules of *Cox v. Hickman*, 8 H. L. C. 268, and the cases following it, were established, that “it has been decided in so many cases that an agreement between the parties *to be jointly interested in the profits of one transaction constitutes a partnership, and authorizes them to do all that is necessary to obtain profits, as usual in such matters, that the rule cannot now be shaken.*” The rule has been most effectually shaken, and, as a universal principle, as it is stated, is entirely unsound, as is the decision in *Jones v. Foster*. The defendants in this latter case had no more property in the goods bought by D. in his old firm name, or the right to control them, than the defendants had in the goods in the two previous cases stated in this note; and in this case, as in those, D. had the same right to use the goods which he had purchased in his own firm-name, as he might have elected to do, as in those other well-decided cases, the purchaser of the paper in the one case, and of the dye-stuffs in the other, was

itors, empowering the trustees to carry on the business under the name of the "S. Company." Two of the creditors, C. and W.,

rightly decided to have had, with respect to the paper and dye-stuffs so respectively purchased by them.

We have made this lengthy analysis of the unsoundly decided case of *Jones v. Foster*, simply because we are aware that some of the courts in this country have not followed or assented to the sound principles of *Cox v. Hickman*, 8 H. L. C. 286, and the other cases following it; and we thought it well, by the exposure of the fallacies in the New Brunswick case of *Jones v. Foster*, 12 N. B. R. 607, to show to what ridiculous results the ignoring of those principles leads on the part of judges and courts that do not act on them or misunderstand them.

Nicholson v. Ricketts, 2 El. & El. 497, is a case which is in marked opposition to the holding in *Jones v. Foster*, 12 N. B. R. 607; the facts in several important particulars being essentially the same. In *Nicholson v. Ricketts*, V. & Co., merchants trading in Buenos Ayres, agreed with defendants, merchants trading in London, to carry on joint exchange operations; by which V. & Co. were, at Buenos Ayres, to draw bills periodically on defendants, to sell them there, and to invest the proceeds, keeping defendants out of cash advances by periodically remitting to them bills to the same amount on other firms, to be bought by V. & Co. These transactions were on the footing of a community of profit and loss, which, under the circumstances of the case, constituted the parties partners with respect to these transactions. Plaintiffs, a firm at Buenos Ayres, bought from V. & Co. certain of the bills drawn by the latter, in their own name, on defendants, in the course of these operations. Plaintiffs were induced to buy the bills by the statement of a broker, employed by V. & Co. to procure purchasers, that "the bills were all in order, he having seen defendants' letter of credit to V. & Co., in virtue of which the bills were drawn." Defendants refused to accept these bills on presentation. V. & Co. becoming bankrupts, an action was brought against the defendants as drawers of the bills. The court held, on a special case stated, that although the defendants and V. & Co. were partners, the defendants were not liable on the bills, V. & Co. having no power to make defendants liable by their contract, notwithstanding the agreement that existed between them. The defendants only became liable on such bills when they accepted them. *A fortiori*, they would not have been liable if V. & Co. had made their own promissory notes,

for goods bought by them before and after the partnership was constituted, without either express or implied authority, as in the New Brunswick case.

Ex parte The Darlington & Stockton Banking Co., 11 Jur. N. S. 122, was, in effect, decided on the principles laid down by us in the text. It was there held that although a partner may have full authority to deal with the partnership assets, and to draw, accept, and indorse bills of exchange, it is the duty of persons having dealings with them, when they have reason to believe that a particular act is being done in the partnership name for the private benefit of the partner, to ascertain the extent of his authority; otherwise the persons so dealing with him must depend on the right and title of the partner, or on circumstances sufficient to repel the presumption of fraud. The question is simply one of authority, as in the case of an ordinary agency; the same evidence being applicable to establish the authority of the principal in either case. Lord Westbury well says: "I take it that the law on the subject is perfectly clear and well established. Generally speaking, a partner has full authority to deal with the partnership property for partnership purposes. If the business of the partnership be such as ordinarily requires bills of exchange, then, unless restrained by agreement, any one partner may draw, accept, and indorse bills of exchange in the name of the partnership for partnership purposes. All persons may give credit to his acts, and his authority, unless they have notice, or reason to believe, that the thing done in the partnership name is done for the private purposes, or on the separate account of the partner. In that case, *authority*, by virtue of the partnership contract, ceases; and the person dealing with the individual partner is bound to inquire and ascertain the extent of his authority; otherwise he must depend on the right and title of the partner, or on circumstances sufficient to repel the presumption of fraud. These principles have been established by a long series of decisions, — if, indeed, decisions were at all required to show the proper application of the rule of law, which is so plain and obvious as that which results from the ordinary law of agency, as applied to partnerships." *Ibid.* 123. Here, clearly, was simply an application of the rules of law as to an agency being held applicable to partnerships.

The principle is clear that a party is not liable as a partner, except he give to his partner express or implied authority

were named among the trustees. C. never acted. W. acted for six weeks and then resigned. The other trustees subsequently purchased goods from the plaintiff, for which they gave the acceptance of the S. Company. In an action against C. and W., it

to pledge his credit in the transaction out of which the claim arises. It is, as stated before, a mere question of authority; of agency; the law as to agency being clearly applicable to show the authority. See *Thom v. Smith*, 21 Wend. 365; *Graeff v. Hitchman*, 5 Watts, 454; *Ostrom v. Jacobs*, 9 Mete. 454. *Smith v. Craven*, 1 Cr. & J. 500, is applicable to further show the absurdity of the holding in *Jones v. Foster*, 12 N. B. R. 607; the two cases being singularly alike. In *Smith v. Craven*, 1 Cr. & J. 500, which was decided long before *Cox v. Hickman*, 8 H. L. C. 268, the question of liability is put upon the principles of agency. It was held in *Smith v. Craven*, where A., B., and C., not being general partners, entered into a joint speculation, and each was to contribute a third, that A., who had paid his share, was not liable to the bankers of B. for moneys advanced by such bankers on the individual credit of B., without the knowledge of A., though such moneys were applied in payment of bills drawn upon B. in the course of the joint speculation. *Heap v. Dobson*, 15 C. B. N. S. 460, is to the same effect. There a ship belonging to A., with which he, B. & C., had had profit and loss transactions, was chartered to B., and it was arranged between A., B., and C. that the ship should go to the southern coast of this country for a cargo which A. represented he had there, and take it to England, on joint account of the three, and that goods to the amount of £3000 should be shipped by each of the three for an outward cargo, and sold on joint account, the profits to be divided in proportion to the value of the goods shipped by each. A. shipped, among other things, goods to the value of £1377, which he obtained from the plaintiffs on credit. A. having become bankrupt, the plaintiffs discovered that the goods were shipped as a joint adventure, and sued B. for the price. It was claimed that the outward cargo having been the joint adventure of the three, notwithstanding the private arrangement between themselves, they were, *quoad* third persons, clothed with all the authority and responsibility of partners, and that each of the three was liable for the whole amount of the goods shipped on the joint account. Byles, J., said: "If the agreement had been that each of the three should contribute to the joint adventure £3000 in money, instead of that amount

in goods, you would have hardly contended that B. would have been responsible to the person from whom A. borrowed his £3000 to come into the concern." The court held that B. and C. were not liable: putting it again on the question of authority or agency; that there was nothing in the arrangement to authorize one of the three to bind the others as their agent in respect of the third share of the cargo which he undertook to supply for the joint adventure. The decision is quite as applicable to the facts in *Jones v. Foster*, 12 N. B. R. 607, that there M. and D. had no more authority to purchase goods in his own firm's name to bind F. & S., than the latter had to make M. & D. liable for moneys which F. & S. might have obtained, through their bankers, for the payments made by F. & S.

In Pennsylvania, where, as in Massachusetts, and in others of the States, we find so much sound law, we find the same principle laid down in the case of *Donnelly v. Ryan*, 41 Pa. St. 306, by Woodward, J., who says: "The point stands as clear on reason as on authority; for when no credit is given to a firm, which, in law, is a distinct person from the members who compose it, why should redress be sought against the firm? As well might a creditor who had loaned his money on the credit of an individual, attempt to pursue it into the business or property of third persons, and hold them responsible to himself." See, also, *Brook v. Evans*, 5 Watts, 200; *Graeff v. Hitchman*, 5 Watts, 454; *Clay v. Cottrell*, 6 Harris, 413; *Gibson v. Stone*, 43 Barb. 285, 291; *Smith, Adst. Perry*, 29 N. J. 74; *Stevens v. Fawcett*, 24 Ill. 483; *Fawcett v. Osborn*, 32 Ill. 411; *Macy v. Combs*, 15 Ind. 469; *Reynolds v. Hicks*, 19 Ind. 113; *Loomis v. Marshall*, 12 Conn. 69. In *Voorhees v. Jones*, 29 N. J. 270, 277, in a suit by a creditor of a firm, against the firm, it was held that it was incompetent to show by parol evidence that the contract of partnership was otherwise than it was constituted by the written articles. In *Macy v. Combs*, 15 Ind. 469, 472, it was held that the common reputation and understanding as to who were members of a firm was not legal evidence. The evidence received by Allen, J., in *Jones v. Foster*, 12 N. B. R. 607, and sustained by the whole court, is opposed to the proper holding in *Voorhees v. Jones*, *supra*; but such holding in *Jones*

was held that they could not be sued as partners on the bills, and that they were not liable for goods sold and delivered, there being no distinction between the bills and the consideration for which they were given.

The case of *Redpath v. Wigg*,¹ was somewhat different from *Cox v. Hickman*. The facts in *Redpath v. Wigg* were that a trader, carrying on business as M. & Co., ordered goods of the plaintiff, and before their delivery, executed an inspectorship deed of which the defendants were inspectors. The plaintiff afterwards wrote a note, addressed to the debtor, informing him that the goods were ready for delivery, and the defendants replied, requesting him to send the goods, and signing "for M. & Co." The court held that the inspectorship deed, and the acts of the defendants under it, did not constitute them principal traders, so as to make the debtor only a servant or agent of theirs, and that they were not liable under the contract.

A third case with elements very similar to those in *Cox v. Hickman* and *Redpath v. Wigg* (*supra*) is *Easterbrook v. Barker*.² Here, under a deed of composition under the English Bankruptcy Act, 1861, the debtor assigned his works and effects to trustees, the business to be carried on by him under their control. After this the debtor continued to manage the business under the direction of the trustees, paying all moneys received by him to the banking account of the trustees; who met at the works weekly, inspected the books, and furnished the debtor with money to meet all disbursements which would be required during the ensuing week for wages, materials, etc., but they gave him no power to pledge their personal credit. In an action against the trustees for goods supplied to the assigned works during the period of their trusteeship, the County Court held that they were liable; but, on appeal, the Court of Common Pleas reversed this decision, and, following the decisions in *Cox v. Hickman*,³ and *Bullen v. Sharp*,⁴ they held that there was no partnership; and, following *Redpath v. Wigg*,⁵ held further that no such relation as that of master and servant, or that of principal and agent was constituted by the deed between the trustees and the debtor; that there was no liability in respect of ostensible authority, for the credit was given to the debtor, and that the deed itself gave the debtor no authority to pledge the trustees' credit.

Each ostensible partner in a firm is its agent and representative with reference to all business within the scope of the partnership.

v. Foster is only one of the many legal errors with which that case abounds.

¹ L. R. 1 Ex. 335.

² L. R. 6 C. P. 1.

³ 8 H. L. C. 268.

⁴ L. R. 1 C. P. 86.

⁵ L. R. 1 Ex. 335.

And if, in the conduct of partnership business, and with reference thereto, one partner makes false or fraudulent misrepresentations of fact to the injury of innocent persons who deal with him as representing the firm, and without notice of any limitations upon his general authority, his partners cannot escape pecuniary responsibility therefor upon the ground that such misrepresentations were made without their knowledge. This is especially so when the partners, who were not themselves guilty of wrong, received and appropriated the fruits of the fraudulent conduct of their associate in business.¹

A sole surviving partner of an insolvent firm, who is himself insolvent, can make a valid assignment of partnership assets for the benefit of the joint creditors, with preference to some of them, and such assignment is not void because of the fraudulent omission from the schedule by the surviving partner of certain property which constituted a part of the partnership assets, and was appropriated by him to his own use. Such fraud does not affect the rights of the assignee and of the beneficiaries of the trust who were ignorant of the fraud of the grantor. If the assignment was valid when executed, no subsequent conduct on the part of the grantor or the trustee, however fraudulent, can avoid the deed, and deprive the creditors, accepting it in good faith and not participating in the fraud, of their rights under it.²

D. and I. were partners, engaged in carrying on a small business in buying and manufacturing wheat and grain, in a small town in an interior county in Indiana; shipping the flour and such surplus of the grain as was not required for manufacturing, in a mill of an average capacity of thirty barrels of flour per day, to Indianapolis and Baltimore, for sale and immediate delivery. Their whole working capital varied from \$2000 to \$4000. D. carried on the business, while I. resided in Pennsylvania, and rarely visited their place of business in Indiana. In 1877, and five years subsequent to the formation of the partnership, D., without the knowledge of I., gave orders to the plaintiffs, commission-merchants and grain-brokers in Baltimore, for sale of 165,000 bushels of wheat for future delivery. These orders were executed by the plaintiffs; the price amounting to \$251,794.84. No grain was shipped by D. to meet these sales, and the plaintiffs paid as differences, \$17,215.94. In an action against I., as surviving partner

¹ *Strang v. Bradner*, 114 U. S. 555; *Stockwell v. United States*, 13 Wall. 531, 547; *Chester v. Dickerson*, 54 N. Y. 1; *Locke v. Stearns*, 1 Met. 560; *Lothrop v. Adams*, 133 Mass. 471; *Blight v. Tobin*, 7 T. B. Mon. 612; *Durant v. Rogers*, 87 Ill. 508.

² *Emerson v. Senter*, 118 U. S. 3;

Hampstead v. Johnston, 18 Ark. 123, 140; *Cornish v. Dews*, 18 Ark. 172, 181; *Mandel v. Peay*, 20 Ark. 325, 329; *Hunt v. Weiner*, 39 Ark. 70, 75; *Marbury v. Brooks*, 7 Wheat. 556, 577; *Brooks v. Marbury*, 11 Wheat. 78, 89; *Tompkins v. Wheeler*, 16 Pet. 106, 118.

of D. & I., for this sum, it was claimed for the defendant that the transaction was not authorized by the partnership agreement, nor within the regular course of the partnership business, nor within its apparent scope. The court charged in favor of the plaintiffs, for whom the verdict and judgment were entered. The Supreme Court, on error, held that such liability did not arise from the partnership agreement between D. and I.; nor from any implication arising out of the previous transactions between them and the plaintiffs; and that the court below was in error in holding, and, in effect, directing the jury, that the business of dealing in grain involved, as a matter of law, as an essential characteristic of the business, not only dealing in grain on hand for present delivery, for cash or on credit, but, also, dealing in futures by means of contracts of sale or purchase for purposes of speculating upon the course of the market. The judgment was reversed and a new trial was ordered.¹

¹ *Irwin v. Williar*, 110 U. S. 499. Two questions of importance are involved in this case, one, as regards the general doctrine of agency as applicable to a partnership; the other, as to dealing in "futures." The court below assumed, because I. & D. were dealers in grain, that, therefore, *all* dealings in grain by one member of the firm, in the name of the firm, would bind the firm. The United States Supreme Court, in dealing with this fallacy, said: "In this, we think, there was error. The liability of one partner, for acts and contracts done and made by his co-partners, without his actual knowledge or assent, is a question of agency. If the authority is denied by the actual agreement between the partners, with notice to the party who claims under it, there is no partnership obligation. If the contract of partnership is silent, or the party with whom the dealing has taken place has no notice of its limitations, the authority for each transaction may be implied from the nature of the business, according to the usual and ordinary course in which it is carried on, by those engaged in it in the locality which is its seat, or as reasonably necessary and fit for its successful prosecution. If it cannot be found in that, it may still be inferred from the actual though exceptional course and conduct of the business of the partnership itself, as personally carried on with the knowledge, actual or presumed, of the partner sought to be charged. In the present case the partnership agreement cannot affect the question, because it is not claimed, on the one hand, that it conferred actual authority to make the transactions in dispute, nor, on the other, that the defendants in error had any

notice of its limitations. And so, too, any implication that might have arisen from a previous course of business of this character, carried on by Davis with the knowledge of Irwin, must be rejected, for it is not claimed that any foundation in proof existed for it. The only remaining ground for the implied authority by which it can be claimed that Irwin was bound by the contracts of his partner, is that arising from the intrinsic nature of the business in which the partnership was actually engaged, or from the usual and ordinary course of conducting it at the locality where it was carried on. What the nature of that business in each case is, what is necessary and proper to its successful prosecution, what is involved in the usual and ordinary course of its management by those engaged in it, at the place and time where it is carried on, are all questions of fact to be decided by the jury, from a consideration of all the circumstances which, singly or in combination, affect its character or determine its peculiarities; and from them all, giving to each its due weight, it is its province to ascertain and say whether the transaction in question is one which those dealing with the firm had reason to believe was authorized by all its members. The difficulty and duty of drawing the inference suitable to each case from all its circumstances cannot be avoided or supplied by affixing or ascribing to the business some general name, and deducing from that, as a matter of law, the rights of the public and the duties of the partners. Dealing in grain is not a technical phrase from which a court can properly infer as matter of law authority to bind the firm in every case

The plaintiff, having been a clerk in the defendant's firm, entered into a verbal agreement with him for a share of profit and loss in the proportion of one-fifth to the plaintiff, and four-fifths to the defendant, it being stipulated that the building in which the business was carried on should remain the property of the defendant. The plaintiff alleged that the agreement was for a partnership, and claimed a dissolution and an account of assets. The defendant denied the partnership, and alleged that the plaintiff was only manager. Held, that under the facts proved, the agreement for sharing profit and loss in certain proportions conferred all the rights of partnership *inter se*,¹ subject to the stipulation as to the buildings remaining the property of one partner; that the defendant could not maintain that the legal effect of partnership should not follow such a contract, and that the plaintiff had a right to a dissolution and sale of the assets of the partnership, including the good-will. But as to the good-will, it was only that which could be sold by its being quite understood that the mills

irrespective of its circumstances; and if, by usage, it has acquired a fixed and definite meaning, as a word of art in trade, that is a matter of fact to be established by proof and found by a jury. It may mean one thing at Brazil in Indiana, another at Baltimore. It may not be the same when standing alone with what it is in connection with a flouring-mill in a small interior town. It may mean dealing in grain on hand for present delivery for cash or on credit, or it may mean, also, dealing in futures by means of contracts of sale or purchase for purposes of speculating upon the course of the market. We are quite clear that the latter feature of the business, as it may sometimes be prosecuted, is not, as matter of law, an essential characteristic of every business to which the name of dealing in grain may be properly assigned. And yet this is distinctly what in the present case was given to the jury as the law, and in that respect the Circuit Court erred." This is so clear and accurate an exposition of the law in the matter, and so thoroughly harmonizes with the late well-decided English cases, and with the views we have expressed in this Part, that we have quoted thus fully from the judgment.

The other point involved in the case is as to whether the contract was void as a wagering or gambling contract. The court laid it down as the generally accepted doctrine in this country, that a contract for the sale of goods, to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them; but such a con-

tract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer; and, if, under guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void; all wagering contracts being generally held in this country to be illegal and void as against public policy. *Dickson's Executor v. Thomas*, 97 Pa. 278; *Gregory v. Wendell*, 40 Mich. 432; *Lyon v. Culbertson*, 83 Ill. 33; *Melchert v. American Union Tel. Co.*, 3 McCrary, 521; 11 Fed. Rep. 193, and note; *Barnard v. Bockhaus*, 52 Wis. 593; *Kingsbury v. Kirwan*, 77 N. Y. 612; *Story v. Salomon*, 71 N. Y. 420; *Love v. Harvey*, 114 Mass. 80. In England, it is held that the contracts, although wagers, were not void at common law. But this has been altered by statute, 8 & 9 Vic. c. 109, sec. 18, declaring that they "shall be null and void," and making such wagering contracts or agreements non-enforceable in courts of law and equity. It has been held in England, that, the statute has not made such contract illegal, but only non-enforceable. *Thacker v. Hardy*, 4 Q. B. Div. 685. We shall consider the question fully in a later volume of this work.

¹ See *Syers v. Syers*, 1 App. Cas. 154; *Greenham v. Gray*, 4 Ir. Com. L. R. 501; *Pooley v. Driver*, 5 Ch. Div. 458.

and premises, and any other exclusive property of the defendant, were not to be interfered with, and not to be sold, and that the defendant would be entirely at liberty, whoever bought, to carry on his business at the mill in his own name, as long as and in such manner as he liked. The sale was to be conducted by an independent firm of solicitors, with power to either partner to bid. The sale was to be of the business as a going concern, but subject to the defendant's rights and ownership as named. A doubt was expressed by the court, if, under such a state of facts, and so treated, there would be any good-will to sell. A doubt as to whether there was any going concern to sell would be equally as well founded.¹

Where several parties were jointly interested in the profit and loss of a series of voyages of a vessel, of which one of them was master and supercargo, it was held by the United States Supreme Court that, though a stranger could not be introduced as a partner during the pendency of these voyages, yet, after the last voyage had been terminated, the interest of one party might be assigned, and the assignee could maintain a bill for an account against the master and supercargo, joining the other proper parties.²

The entire property and assets of a partnership were conveyed to, and vested in, a corporation, subject to the debts and liabilities of the partnership. The debts and liabilities of the firm there-

¹ *Pawsey v. Armstrong*, 18 Ch. D. 698.

² *Mathewson v. Clarke*, 6 How. 122. The case decides that while one partner cannot sell his interest in the firm, so as to constitute the purchaser a member of the firm, yet he may dispose of his interest in the property of the firm to a stranger, who will take the ownership of his assignor. In *Nicoll v. Mumford*, 4 Johns. Ch. 525, it was held that an assignee or separate creditor of one partner is entitled only to the share of such partner, after a settlement of the accounts, and after all the just claims of the other partner are satisfied. The interest of each partner is his share in the surplus, subject to all partnership accounts; and that interest or surplus only is liable to the assignee or separate creditors of such partner claiming either by assignment or under execution. As between one partner and the assignees or separate creditors of the other, they cannot affect the joint property any further than the partner whose assignees or creditors they are could have affected it. This is the settled rule in cases of partnership property; and the doctrine of Lord Hardwicke in the leading case of *West v. Skip*, 1 Ves. Sen. 239,

has received a constant sanction in succeeding cases both in England and in this country. *Fox v. Hanbury*, Cowp. 445; *Taylor v. Fields*, 4 Ves. 396; *Dutton v. Morrison*, 17 Ves. 193; *Young v. Keighley*, 15 Ves. 557; *Marquand v. The New York Manuf. Co.*, 17 Johns. 525; *Church v. Knox*, 2 Day, 514; *Peirce v. Jackson*, 6 Mass. 242; *Wilson v. Carine*, 2 Johns. 280; *Moody v. Paine*, 2 Johns. Ch. 548; *Knox v. Simmons*, 4 Yeates, 477; *Wallace v. Patterson*, 2 Har. & Mill. 463; *Harrison v. Sterry*, 5 Cranch, 289; *McComb v. Dunch*, 2 Dall. 73. The sale of the interest of a partner in the partnership effects is made subject to the partnership debts, and is in effect only a sale of the undefined surplus interest of the partner after the partnership debts are paid. *Woodport v. Ward*, 3 Dess. 203; *McCulloch v. Dashiell*, 1 Harr. & G. 96; *Barber v. Hartford Bank*, 9 Conn. 407; *Witter v. Richards*, 10 Conn. 37; *Wilder v. Keeler*, 3 Paige, 167; *Lynndon v. Gorham*, 1 Gall. 367; *Murray v. Murray*, 5 Johns. Ch. 73; *In re Smith*, 16 Johns. 102; *Wiston v. Ewing*, 1 Ala. N. S. 129; *Scruggam v. Carter*, 12 Wend. 131; *Doner v. Stanffer*, 2 Pa. 198.

upon became the debts and liabilities of the corporation. The property ceased to be partnership property, and became consolidated in a unity of interest in the corporation. The partners ceased to be partners, and became holders of shares in the capital stock of the company.¹ Their lien as partners ceased when their character of stockholders began. The constitution of the corporation and the transfer to it of the property being authorized by law, and being intended to settle and extinguish the partnership equities, and to place the concern on a new footing, effected that object; the parties who were entitled to the partnership equities being those who organized the corporation, and made the conveyance to it. It was not the corporation alone which was concerned in the transfer, but the creditors also, who trusted it after it was formed, and who stand in the position of *bonâ fide* claimants against its property and assets. While they may not be able to claim any precedency over the former partners having debts due to them, they stand on an equal footing with them. It was therefore held, that a lien by owners of a portion of the partnership assets, which existed against the partnership property, subject to the debts then due, prior to the organization of the corporation, had been lost by the conveyance of the parties under an act of the legislature, and ceased to follow the partnership property in the hands of the corporation, and had no priority over other claim against such property which accrued after the organization of the corporation.²

¹ Where parties to a contract hold themselves out to the other contracting parties as partners, though they may sign a contract as a corporation, they may still be sued as partners, even though as such partners they are carrying on business in the name of the corporation. *McGowan v. American Tan Bark Co.*, 121 U. S. 575. See *Simonton v. Sibley*, 122 U. S. 220, where one occupied the dual position as a partner and creditor of a firm, under a special agreement by which the other members of the firm became his debtors, as well as his copartners, in connection with the sale by him to them of a joint interest in railway stock and bonds.

² *Francklyn v. Sprague*, 121 U. S. 215. See *Hoyt v. Sprague*, 103 U. S. 613. These cases are consistent with the decisions in *Nerot v. Burnard*, 4 Russ. 247, and *Payne v. Hornby*, 25 Beav. 280, which hold that where the business is carried on with the consent of the outgoing partner, or the representative of the deceased partner, debts incurred during that period have a preference over the partnership lien upon all newly acquired property.

The principle is thus laid down by Romilly, M. R., in *Payne v. Hornby*, 25 Beav. 286: "The surviving partner may by arrangement give the executors of the deceased partner a mortgage on the partnership stock, in which case they acquire the usual rights of mortgagees to the stock subsequently acquired; but if this be not done, the mere fact that their testator was a partner at the time of his decease does not give them a lien. . . . If the executors file a bill for winding up the partnership, but do not apply for a receiver or an injunction, I apprehend that if a variation takes place in the stock and goods while the business is carried on by the surviving partner alone, and fresh goods are brought into the business, and he becomes bankrupt, they belong, in the first place, to the creditors who have been created by the subsequent dealing, and not to the creditors of the old partnership; for it was the duty of the executors in that case to come here at once to obtain a receiver, and prevent that course of dealing from going on. If it were not so it would be sanctioning the commission of a fraud against all sub-

A question arose in *Drennen v. London Assurance Company*,¹ and again, in the same case,² under a policy of insurance containing a provision that the policy should become void if the property were sold, or transferred, or a change take place in its title or possession. The court held that an agreement between the assured, a firm, and A., that the latter should pay the former \$10,000 and have a share in the profits of the business, was not a sale or transfer of the property of the firm, as A., although he was to participate in the profits arising from the management of particular property, was not to become a partner with the others, and did not acquire such an interest in the property itself as to effect a change in its title.³

There may be cases in which the holding out of one's self as a partner in a firm has been so public and so long continued as to justify the inference, as matter of fact, that one dealing with the partnership knew it and relied upon it, without direct testimony to that effect; but, as a general rule, a person who is not in fact a partner, who has no interest in the business of the partnership, and does not share in its profits, and is sought to be charged for its debts because of having held himself out, or permitted himself to be held out, as a partner, cannot be made liable upon contracts of the partnership, except with those who have contracted with the partnership upon the faith of such partnership.⁴

sequent and separate creditors, who would be acting under the belief that they were dealing with a person who would be able from his stock-in-trade to pay their debts, but who, in truth, held no stock of his own."

¹ 113 U. S. 51.

² *London Ass. Co. v. Drennen*, 116 U. S. 461.

³ The court held that mere participation in profits would give no such interest in the property contrary to the real intention of the parties. Persons cannot be made to assume the relation of partners, as between themselves, when their purpose is that no partnership shall exist. There is no reason why they may not enter into an agreement whereby one of them shall participate in the profits arising from the management of particular property without his becoming a partner with the others, or without his acquiring an interest in the property itself, so as to effect a change of title. *London Ass. Co. v. Drennen*, 116 U. S. 461, 472.

One of several joint owners may transfer his interest in insured property to the others without avoiding the policy. *Lockwood v. Middlesex Mut. Ass. Co.*, 47 Conn. 553, 564. But any process by which a new party to the contract is introduced, by

which the insured shifts the moral hazard from himself to a stranger, creates a new contract and a new relation which the company has not consented to assume. *Malley v. Ins. Co.*, 51 Conn. 222; *Hoffman v. Ins. Co.*, 32 N. Y. 405; *Burnett v. Ins. Co.*, 46 Ala. 11; *Pierce v. Ins. Co.*, 50 N. H. 297; *West v. Ins. Co.*, 27 Ohio St. 1; *Dix v. Ins. Co.*, 22 Ill. 272; *Barnes v. Ins. Co.*, 51 Me. 110; *Ins. Co. v. Ross*, 23 Ind. 179; *Finley v. Ins. Co.*, 30 Pa. 311; *Ins. Co. v. Riker*, 10 Mich. 279; *Dey v. Ins. Co.*, 23 Barb. 623; *Wood v. Ins. Co.*, 31 Vt. 552; *Keeler v. Ins. Co.*, 16 Wisc. 550; *Ins. Co. v. Hauslein*, 60 Ill. 521; *Lappin v. Ins. Co.*, 58 Barb. 325; *Dreher v. Ins. Co.*, 18 Mo. 128; *Savage v. Ins. Co.*, 52 N. Y. 502; *Pindar v. Ins. Co.*, 47 N. Y. 114; *Briggs v. Home Ins. Co.*, 88 N. C. 141; *Oakes v. Ins. Co.*, 131 Mass. 164.

⁴ *Sun Insurance Co. v. Kountz Line*, 122 U. S. 583; *Thompson v. First National Bank of Toledo*, 111 U. S. 529, 536; *Briggs v. Vanderbilt*, 19 Barb. 222; *Bonsteel v. Vanderbilt*, 21 Barb. 26. See cases where there is a community of interest, creating the partnership liability. *Fromart v. Coupland*, 2 Bing. 170; *Green v. Beesley*, 2 Bing. N. C. 108; *Champion v. Bostwick*, 11 Wend. 571; 18 Wend. 175; *Patterson v. Blanchard*, 6 Barb. 537;

Even though a partnership is not dissolved, if one partner allows the other to appropriate the partnership property to pay his individual debt, such appropriation is good as against the creditors of the firm; such creditors having at the time no specific lien upon the property, and no trust upon it which they can enforce. It is only necessary that the disposition of the property should be *bonâ fide* on the part of the partners and the assignee of the property, and without any intent to hinder or delay the creditors of the firm.¹ If, before the interposition of the court is asked, the property has ceased to belong to the partnership; if by a *bonâ fide* transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and, consequently, the derivative equities of the creditors are at an end.² Where one partner, with the consent of his co-partner, receives goods of the firm and is charged therewith, he becomes the owner of the goods, and, in good faith, can make a valid assignment of them.³

In *Davis v. Patrick*,⁴ the manager of an English company, proprietors of a silver mine in Utah, was held liable, under the instructions of the judge of the Circuit Court, as principal; but the judgment of the court was reversed, the plaintiff's contract having been formerly made with the company, and not with the defendant, and the evidence showing that the defendant was not the principal, nor a partner with the company, but was its agent and manager, although he was to receive out of the profits of the business payment of moneys due to him by the company.⁵

1 Seld. 186. In *Dickinson v. Valpy*, 10 B. & C. 128, 140, Parke, J., says: "No person can be fixed with liability on the ground that he has been held out as a partner, unless two things concur, viz.: first, the alleged act of holding out must have been done either by him or by his consent; and, secondly, it must have been known to the person seeking to avail himself of it. In the absence of the first of these requisites, whatever may have been done cannot be imputed to the person sought to be made liable; and in the absence of the second, the person seeking to make him liable has not in any way been misled." See *McIver v. Humble*, 16 East, 169, 174, 176; *Carter v. Whalley*, 1 B. & Ad. 11; *Pott v. Eyton*, 3 C. B. 32, 39; *Martyn v. Gray*, 14 C. B. n. s. 824, 839; *Edmundson v. Thompson*, 8 Jur. n. s. 235; *Benedict v. Davis*, 2 McLean, 347; *Hicks v. Cram*, 17 Vt. 449; *Fitch v. Harrington*, 13 Gray, 469; *Wood v. Pennell*, 51 Me. 52; *Sherrod v. Langdon*, 21 Iowa, 518; *Kirk v. Hartman*, 63 Pa. 97; *Hefner v. Palmer*, 67 Ill. 161; *Cook v. Perhyn*

Slate Co., 36 Ohio St. 135; *Uhl v. Harvey*, 7 Ind. 26; *Central City Savings Bank v. Walker*, 66 N. Y. 424.

¹ *Howe v. Lawrence*, 9 Cush. 553; *Locke v. Lewis*, 124 Mass. 1; *Ex parte Ruffin*, 6 Ves. 127; *Ex parte Fell*, 10 Ves. 347; *Ex parte Williams*, 11 Ves. 3; *Ex parte Rowlandson*, 1 Rose, 416; *Campbell v. Mullett*, 2 Swans. 575; *Allen v. Center Valley Co.*, 21 Conn. 130, 137; *Ferson v. Monroe*, 1 Fost. 462, 469.

² *Case v. Beauregard*, 99 U. S. 119, 125; *Fitzpatrick v. Flanagan*, 106 U. S. 648, 654; *Schmidlapp v. Currie*, 55 Miss. 597; *Kimball v. Thompson*, 13 Mete. 283; *Ladd v. Griswold*, 9 Ill. 25; *Smith v. Edwards*, 7 Humph. 106; *Robb v. Mudge*, 14 Gray, 534; *Baker's Appeal*, 21 Pa. St. 76; *Sigler v. Knox County Bank*, 8 Ohio St. 511; *Wilcox v. Kellogg*, 11 Ohio, 394; *Eldridge v. Phillipson*, 58 Miss. 270; *Anderson v. Tompkins*, 1 Brock. 456, 460.

³ *Huiskamp v. Moline Wagon Co.*, 121 U. S. 310.

⁴ 122 U. S. 138.

⁵ See *Mollwo v. Court of Wards*, L. R.

5. FIDUCIARY RELATIONS OF PARTNERS.

Among the other incidents common to co-partners, as to principals and agents, is this, that as far as a partner stands in respect to his co-partner, or a principal to his agent, in a fiduciary relation, the law, as between trustee and *cestui que trust*, applies alike to partners and agents. We deal with this question as it applies to the usual cases of principals and agents in the next Part, confining our consideration of the question here to matters affecting the rights and powers of co-partners.

Two principles with relation to the doctrine of principal and agent have been recognized from the earliest times. One is, that an agent cannot legally buy his own goods for his principal; the other, that an agent, employed to sell, cannot himself purchase the goods of his principal. If he should do so, and thereby make a profit, his principal may either repudiate the transaction altogether, or, adopting it, may claim for himself the benefit made by his agent. This rule has been repeatedly applied where the transaction was perfectly *bonâ fide*. It is founded on this principle, that an agent will not be allowed to place himself in a situation, which, under ordinary circumstances, would tempt a man to do that which is not the best for his principal, and it is the plain duty of every agent to do the best he can for his principal.¹

4 P. C. 419; Cassidy v. Hall, 97 N. Y. 159. In the case of Davis v. Patrick, 122 U. S. 138, 150, the relation between the defendant and the company was strictly that of creditor and debtor, and not that of partners. The company were the owners of the mine, and the fact that the defendant was to receive payment of moneys due him out of the profits did not constitute him a partner with the company. As we have observed in effect in a previous note in this Part, if it did, then, on the same principle, creditors generally of a firm receiving payment of debts due them by the firm out of the profits should be held liable as partners. Cox v. Hickman, 8 H. L. Cas. 268, and the cases following it, established a more reasonable principle. See Richardson v. Hughitt, 76 N. Y. 55; Curry v. Fowler, 87 N. Y. 33; Eager v. Crawford, 76 N. Y. 97; Burnett v. Snyder, *Id.* 344; 81 N. Y. 550, 555; Loomis v. Marshall, 12 Conn. 69; Turner v. Bissell, 14 Pick. 192; Adeo v. Cornell, 25 Hun, 78; Boston Colorado Smelting Co. v. Smith, 13 R. I. 27; Pooley v. Driver, 5 Ch. Div. 458; *Ex parte* Delhasse, 7 Ch. Div. 511.

¹ These rules were applied to questions arising between partners in Bentley v. Craven, 18 Beav. 75. There four part-

ners established a partnership for the purpose of refining sugar, one of them being a wholesale grocer, who, from his business, was peculiarly cognizant with the variations in the sugar market, and had great skill in buying sugar at the right and proper time for the business. He being the person to buy, it became his duty and business to employ his skill in buying for the sugar refinery at the time he thought most beneficial. Having according to his skill and knowledge bought sugar at a time when he thought it likely to rise, and it having risen, and the firm being in want of some, he sold his own sugars to the firm without letting the partners know that it was his sugar that was sold, but studiously concealing this fact. The court held that the only way in which a sale of that sort could be made valid and effectual would be by communication of the fact. The agent should say to his principal: "I have certain sugars of my own, which I do not choose to sell to you unless you give me a particular price for them. You have the option to do it or not as you think fit." Had he said that, the fiduciary relation between them relating to that transaction would have been determined. If after receiving the statement his partners had consented

When, in partnership, there are such relations of trust and confidence, which one man may occupy towards another, either

to his terms, the transaction might have stood good; but in the absence of such a statement the purchase by one partner for his firm could not be sustained by the court, even though the sale might have been made at the fair market price, and at such a price as that at which he might have sold to any other person, and the firm was held to be entitled to the profit on the transaction made by the individual partner. This principle is firmly established where such fiduciary relations exist. *Lees v. Nuttall*, 1 Russ. & M. 53; 2 Myl. & K. 819; *Copeland v. Mer.* Ins. Co., 6 Pick. 196; *Reed v. Warner*, 5 Paige, 650; *Reed v. Norris*, 2 M. & Cr. 374; *Beal v. McKiernan*, 6 Mill. (La.) 407; *Bartholomew v. Leach*, 7 Watts, 472; *Prevost v. Gratz*, 1 Peters C. C. 364; *Taylor v. Salmon*, 2 Cr. & M. 130; *Baker v. Whiting*, 3 Sumn. 476; *Davore v. Fanning*, 2 Johns. Ch. 251; *Green v. Winter*, 1 Johns. Ch. 27; *Church v. Marine Ins. Co.*, 1 Mason, 341; *Barker v. Marine Ins. Co.*, 2 Mason, 369; *Woodhouse v. Meredith*, 1 Jack. & W. 204; *Parkist v. Alexander*, 1 Johns. Ch. 394; *Butler v. Haskell*, 4 Dess. 651; *Mosely v. Buck*, 3 Munf. 232; *Ex parte Dyster*, 1 Meriv. 172; *Lowther v. Lowther*, 13 Ves. 103; *Wren v. Kirton*, 8 Ves. 502. In *Gillet v. Pepper-corne*, 3 Beav. 78, A. employed B., a stock-broker, to purchase some canal shares. B. apparently bought them from C., the ostensible owner, but who afterwards turned out to be a mere trustee for B. The court after the lapse of several years, and without entering into the question of the fairness of the price, held that the transaction was void on grounds of public policy, and set it aside. See *Brookman v. Rothschild*, 3 Sim. 153; 2 Dow. & Cl. 188; *Bick v. Motley*, 2 Myl. & K. 312; *Bate v. Scales*, 12 Ves. 402; *Munch v. Cockerell*, 9 Sim. 339; *Clements v. Hall*, 24 Beav. 333; *Miller v. Mackay*, 31 Beav. 77; 34 Beav. 295; *Shallcross v. Oldham*, 2 J. & H. 609; *Hodge v. Twitchell*, 33 Minn. 389; *Hichens v. Congreve*, 4 Russ. 562. A., B., and others were common carriers from London to Falmouth, a separate portion of the road being allotted to each, it being stipulated that no partnership should exist between them. A. for himself and the other parties agreed with the Master of the Mint to carry coin from London to Falmouth, and afterwards made another agreement with the Master of the Mint to carry other coin to places not on the road. As it appeared that A. in making this second agreement did not apprise the officers of the Mint that he was treating for him-

self alone, it was held that the other parties had the right to share with him in the profits of the second transaction. *Russell v. Austwick*, 1 Sim. 52. A partner who superintended exclusively the accounts of the firm agreed to purchase his copartner's share of the business for a sum which he knew from accounts in his possession, but which he concealed from his copartner, was an inadequate consideration. The court held that he could not in fairness deal with his partner without putting him into possession of all the information which he himself had with respect to the state of the accounts between them, and that he could not be permitted to maintain an advantage which he had gained over his partner's ignorance. The agreement was set aside. *Maddeford v. Austwick*, 1 Sim. 89. See, further, as to the good faith required in such transactions, *Glassington v. Thwaites*, 1 S. & S. 124, 133; *Crawshay v. Collins*, 1 Jac. & W. 279; *Featherstonhaugh v. Fenwick*, 17 Ves. 298, 309, *et seq.*; *Benson v. Heathorn*, 1 Y. & C. 326; *Murphy v. O'Shea*, 2 J. & Lat. 422; *Dunne v. English*, L. R. 18 Eq. 524; *Molony v. Kernan*, 2 D. & War. 31; *Lowther v. Lowther*, 13 Ves. 95, 102; *Imperial Mercantile Credit Assoc. v. Coleman*, L. R. 6 H. L. 189, 194; *De Bussche v. Alt*, 8 Ch. Div. 286; *Parker v. McKenna*, L. R. 10 Ch. 96; *York & North Midland Ry. Co. v. Hudson*, 16 Beav. 485; *Hamilton v. Wright*, 9 Cl. & F. 111; *Tennant v. Trencharl*, L. R. 4 Ch. 53; *Leach v. Leach*, 18 Pick. 68. The principle stated in the text, and the reason for it, were acted on in *Burton v. Wookey*, 6 Madd. 367. There the plaintiff and defendant entered into partnership together to deal in *lapis calaminaris*. The defendant, who was a shopkeeper, was to take the active part in the concern, and was to purchase the *lapis calaminaris* from the miners in whose neighborhood he lived. Many of the miners were before the partnership in the habit of dealing at his shop, and continued so for some years after the partnership, receiving from the defendant ready money for the *lapis calaminaris*, and paying for their shop-goods afterwards, as they would have done to any other shopkeeper; but subsequently a new course of dealing took place between the defendant and the miners. In the place of paying them for the mineral with money he paid them with shop-goods, and in his account with the plaintiff he charged him as for cash paid to the amount of the price of the goods. The court decreed an account of the profit made by the defendant on

personally or in regard to the particular property which is the subject of the contract, which impose upon him a special and peculiar obligation to deal with the other person towards whom he stands so related, with a candor, a fairness, and a refusal to avail himself of any advantages of superior information, or other favorable circumstance, not required by courts of justice in the usual business transactions of life, the principles applicable to fiduciary relations will be applied.¹

the goods, and that the plaintiff was entitled to an equal division of that profit with the defendant. In delivering the judgment the court said: "It is a maxim of courts of equity that a person who stands in a relation of trust or confidence to another shall not be permitted in pursuit of his private advantage to place himself in a situation which gives him a bias against the due discharge of that trust or confidence. The defendant here stood in a relation of trust or confidence towards the plaintiff, which made it his duty to purchase the *lapis calaminaris* at the lowest possible price. When in the place of purchasing it he obtained it by barter for his own shop-goods, he had a bias against a fair discharge of his duty to the plaintiff. The more goods he gave for the article purchased the greater was the profit which he derived from the dealing in store-goods, and as this profit belonged to him individually, and as the saving by a low price of the article purchased was to be equally divided between him and the plaintiff, he had plainly a bias against the due discharge of his trust or confidence towards the plaintiff." *Burton v. Wookey*, 6 Madd. 368. The same principle was acted on in *Blisset v. Daniel*, 10 Hare, 493, 522, 536, where a majority of the partners had the power of expelling any partner from the firm, and appropriating his share at its valuation based on the immediately preceding profits. The court held that such a power could be exercised, but it must be in good faith; not against the truth and honor of the contract, nor merely to enable the continuing partners to appropriate to themselves the share of the expelled partner at a fixed value less than the true value.

¹ Acting on this principle in *Brooks v. Martin*, 2 Wall. 70, where such relations existed between the parties as partners, it was held, where one partner possessing peculiar knowledge of the business and property of the firm, purchased the share of his partner in the firm, who did not possess that knowledge, and whose position towards his partner was one of trust and confidence, that, in order to sustain such a sale, it must be made to appear,

first, that the price paid approximates reasonably near to a fair and adequate consideration for the thing purchased; and second, that all the information in possession of the purchaser, which was necessary to enable the seller to form a sound judgment of the value of what he sold, should have been communicated by the former to the latter. See *Anderson v. Lemon*, 8 N. Y. 236; *Church v. Church*, 25 Pa. 278; *Hunter v. Atkins*, 3 Myl. & K. 113; *Pugh's Heirs v. Bell's Heirs*, 1 J.J. Marsh. 399; *Morse v. Royal*, 12 Ves. 335; *Maddeford v. Anstwick*, 1 Sim. 89; *Michoud v. Girod*, 4 How. 503; *Bailey v. Teakle*, 2 Brock. 51-54. A person employed on behalf of himself and his co-partners in negotiating the terms of a lease, is not entitled to stipulate clandestinely with the lessors for any private advantage to himself. Where, therefore, a sum of £12,000 was paid in pursuance of such a stipulation, the party receiving it was declared to hold it in trust for the partnership. *Fawcett v. Whitehouse*, 1 Russ. & M. 132. See *Carter v. Horne*, 1 Eq. Ab. 7; *Hichens v. Congreve*, 1 Russ. & M. 150, note; *Lamar's Ex'r v. Hale*, 79 Va. 147, 157. Where one of a co-partnership, by any means, gets a fund belonging to the firm, he is not at liberty to appropriate it to his own exclusive benefit, but must share it with his co-partners. *Eason v. Cherry*, 9 Jones Eq. (N. C.) 361; *Allison v. Davidson*, 2 Dev. Eq. 79. After the dissolution of a partnership and pending its liquidation, a partner is not permitted to do any act, still less to make use of the partnership funds, in a manner inconsistent with the purpose of a just and proper settlement; and where a partner has collected partnership money under circumstances from which an agreement on his part not to receive it may be inferred, and where his receiving it was contrary to good faith, he may be required to pay it into court. *Gridley v. Conner*, 2 La. An. 87, 89. See *Shropshire v. Russell*, *Id.* 961. In *Bradbury v. Barnes*, 19 Cal. 122, *Baldwin, J.*, said: "There can be no doubt that one partner may purchase with his own funds and on his account, the interest of his co-partner in real estate at public sale, if

A partner has not a right to prefer his own interest to that of the firm, nor deprive the partnership of a profitable bargain, by taking it to his own account. The doctrine is deducible from the nature of the contract of partnership, on entering into which the partner promises to his associates his efforts for the common benefit. This promise he would violate by seeking his individual advantage in preference to that of the partnership. Hence, the books abound in cases, many of which we cite in the notes in this section, where a partner, who, while his relations as such existed, has stipulated clandestinely for any private benefit to himself, has been compelled to divide such gains with his associates.¹

there be no circumstances of fraud or of a trust apart from this relation, and so purchasing, hold the property as a stranger might. It is true that partners occupy confidential relations towards each other, but this is in respect to the firm business; but this relation does not forbid one from buying of another, when both have an equal opportunity and means of knowing the value of the property and its condition. The fact that the sheriff's sale is public and open, is itself *prima facie* proof that no advantage is taken; and no reasons of policy exist to restrain bidding by other partners than the defendant, and who would be more disposed to bid, probably, than strangers. . . . Generally, one partner has a right to buy the whole or a portion of the interest of his associate at private sale, as he might purchase of a stranger, and we can see nothing which should deny or qualify this right in the fact that the sale is made through the instrumentality of the officer acting in this respect for the partner." And see *Gunter v. Laffan*, 7 Cal. 588.

¹ In *Lowry v. Cobb*, 9 La. An. 592, the court held that these principles were not applicable under the following state of facts. The plaintiff and defendants owned a plantation in partnership. Difficulties having arisen between them, the property was placed in the hands of a receiver, and arbitrators, clothed with the powers of amicable compounders, appointed. After flagrantly violating the award and usurping the administration of the property, the defendants confessed a judgment in favor of a mortgage creditor, who seized and sold the property. At the sale, the plaintiff, through friends, bought the property, and the defendants claimed the benefit of the purchase for the partnership. The court held that they were not entitled to it. *Slidell, C. J.*, in delivering the judgment of the court, said: "We conceive that the circumstances of the present case do not fall within the rule, and

that by their own inequitable conduct the defendants excluded themselves from its application. The plaintiff had faithfully submitted to the award, by which the partnership property was placed under the administration of the receiver, and which award they were bound, by every consideration of partnership and moral duty, to respect. Without any just cause they arrested the possession from the receiver; diverted to their own use the crops which had been sacredly appropriated to purposes vitally necessary to the protection of the partnership interests; awakened the distrust of an important creditor; and occasioned, if not invited, a forced sale by this creditor of the partnership estate under his mortgage. When the plaintiff thus saw his own ruin impending by the bad faith of his co-proprietors, who had thus flagrantly violated the compact for their common preservation, the instinct of self-defence necessarily compelled him to seek the assistance of his friends; and having sheltered himself in some degree through their interposition, from the calamity which would otherwise have crushed him, the promoter of the mischief has no equity to share that shelter with him. A contrary doctrine would hold out to bad faith the chance of a successful wrong, with a certainty of impunity in case of failure." *Lowry v. Cobb*, 9 La. An. at 593. In *Sexton v. Sexton*, 9 Gratt. 204, two partners carried on an extensive business, embracing various subjects, and they kept no regular set of books. One of them attended exclusively to the out-door business, made the contracts, and executed notes for the firm, of which no regular account was kept. They at length quarrelled, and the in-door partner insisted upon a dissolution of the partnership, and there was a proposition to buy and sell. The out-door partner, in making an estimate of the value of the property for his own guidance in any proposition he might make or receive, at-

tempted to make out a list of the debts due from the concern, and he estimated them at about one-half what they turned out to be; but it did not appear that he represented them to his partner at any amount, or that his partner did confide or would have confided in any representations he might have made. The court held that the position of the seller called for the exercise of the utmost good faith on his part, and that he was bound not only to disclose truly any information in his possession that might be called for, and if he perceived that his partner was laboring under incorrect views in reference to the amount of the debts due by the concern, by which he might be misled into too high an offer for the interest to be sold, it was his duty to furnish all the data he might have, by which such views might be corrected and the mischief prevented. But, as there was no evidence of any abuse of confidence, or any effort to obtain an unfair advantage on the part of the partner selling, nor any information withheld which was called for, nor any knowing acquiescence by him in any mistaken views or estimates on the part of the purchaser, by which he might be ensnared into self-deception and loss; the sale was sustained. See *Laffan v. Naglee*, 9 Cal. 662; *Anderson v. Lemon*, 4 Sandf. 552; *Coder v. Huling*, 27 Pa. St. 84; *Evaus v. Gibson*, 29 Mo. 223; *Wheatley's Heirs v. Calhoun*, 12 Leigh (Va.), 264; *Smith v. Ramsey*, 6 Ill. (1 Gilm.) 373.

A firm carrying on a general produce business had a debt due to them, which was secured by a mortgage. A., one of the firm, became one of the owners of the mortgaged property, which the firm had been anxious to purchase. The debt was paid to the firm. The remaining members of the firm claimed a share in the benefit of A.'s purchase. The court thus laid down the law applicable to the case:—"Each partner is the agent of his co-partners in all transactions relating to partnership business, and is forbidden to traffic therein for his own advantage, and if he does will be held accountable for all profits. But beyond the line of the trade or business in which the firm is engaged, there is no restraint on his right to traffic. As one partner has no authority to bind the firm outside of their ordinary business, he cannot of course be held liable to account should he make a profitable adventure in a matter not legitimately connected with the business of the firm. The difficulty generally is, to ascertain what acts are within the scope of the particular trade or business. But in this case there is no embarrassment whatever in the application of the principle. This was a partnership to do a general produce busi-

ness. It contemplated no dealings in real estate, and each partner was at liberty to buy and sell real estate, and was under no legal liability to account to his co-partners." So far as there was fraud in the case, the parties were in *pari delicto*, and the plaintiffs were without remedy. *Wheeler v. Sage*, 1 Wall. 518. See *Randall v. Howard*, 2 Black, 585; *Phippen v. Stickney*, 3 Mete. 384; *Bexwell v. Christie*, 1 Cowp. 395; *Howard v. Castle*, 6 T. R. 642; *Veazie v. Williams*, 8 How. 134; *Hawley v. Cramer*, 4 Cow. 717; *Fuller v. Abrahams*, 3 Br. & B. 116; *Jones v. Caswell*, 3 Johns. 29; *Doolin v. Ward*, 6 Johns. 194; *Wilbur v. Howe*, 8 Johns. 444; *Thompson v. Davies*, 13 Johns. 114.

An association known as a mining partnership is a partnership *sub modo* only; *Kahn v. Smelting Co.*, 102 U. S. 641; the *dilectus personae*, which is essential to constitute an ordinary partnership, having no place in these mining associations. *Duryea v. Burt*, 28 Cal. 569; *Settembre v. Putnam*, 30 Cal. 490; *Taylor v. Castle*, 42 Cal. 367; *Skillman v. Lockman*, 23 Cal. 199, 203. And a purchase by one member of such an association of the share or interest in it of another does not inure to the benefit of his associates. *Bissell v. Foss*, 114 U. S. 252. In *Lamar's Ex'or v. Hale*, 79 Va. 147, 160, with reference to this description of partnership, the court said: "This mining partnership was unlike ordinary trading partnerships in a remarkable feature. In the latter there is always what is implied by the phrase '*dilectus personarum*.' In them no one can become a partner without the consent of the rest. In mining partnerships, like that under consideration, there was no '*dilectus personarum*.' Each member could transfer his share to any other person, and that person becomes, *ipso facto*, a member of the company, occupying the same relation thereto that the original member occupied. This was the distinguishing feature of this company as a mining partnership, and it made the membership changeable and uncertain. But it was a principle of law, and all persons dealing with the company or with its property were and are bound to take notice of it." In *Bradbury v. Barnes*, 19 Cal. 120, *Baldwin, J.*, said: "If associates in a mining claim are to be regarded as general partners, a point which we do not decide, still we do not think the rule applicable to trustees and *cestuis que trust*, guardian and ward, which qualifies the right of purchase by the trustee of the *cestui que trust*, can be held to apply." See *Kahn v. Smelting Co.*, 102 U. S. 641. In England it has been held, as in this country, that one of several co-adventurers in a mine has not, as such, any

authority to pledge the credit of the general body, for money borrowed for the purposes of the concern. And the fact of his having the general management of the mine makes no difference, in the absence of circumstances from which an implied authority for that purpose can be inferred. *Ricketts v. Bennett*, 4 C. B. 686. In *Fereday v. Wightwick*, 1 Russ. & M. 45, it is said: "Mining concerns are, to some purposes, trading concerns, but they are not so as to all: they are not so in this particular, namely,—that they are not, as an ordinary partnership trade, subject to dissolution on the death or bankruptcy of any of the partners, and the shares are transferable without the consent of the other partners. In these particular instances, they have not all the incidents of a trading concern; in other respects, it has been repeatedly held that they have." In *Dickinson v. Valpy*, 10 B. & C. 123, it was held that the directors of a mining association cannot bind the members by accepting a bill of exchange, unless they are authorized to do so by the deed or instrument of co-partnership; by the necessity of such a power to the carrying on of the business; by the usage of similar establishments, or by the express assent of the party sought to be charged. But the members of a mining company have authority by law, in the absence of any proof of a more limited authority, to bind each other by dealings on credit, for the purpose of working the mines, if that appear to be necessary or usual in the management of the mines. *Tredwin v. Bourne*, 6 M. & W. 461. See *Vice v. Lady Anson*, 7 B. & C. 411; *Bourne v. Freeth*, 9 B. & C. 632; *Hawtayne v. Bourne*, 7 M. & W. 595; *Jefferys v. Smith*, 1 J. & W. 301; *Duncarray v. Gill*, 4 C. & P. 121. In *Hawken v. Bourne*, 8 M. & W. 703, a joint-stock company was formed to work a mine, in which the defendant became a shareholder, and took part in its proceedings. The prospectus issued on the formation of the company stated that all supplies for the mine were to be purchased at cash prices, and no debt was to be incurred; and the script certificates also bore an indorsement to the same effect. The plaintiff supplied goods for the necessary working of the mine on the order of a resident agent appointed by the directors to manage the mine, which was the customary course in such concerns. It was held, that the defendant was liable to the plaintiff for the price of such goods, notwithstanding the statements in the prospectus and certificate, unless it were shown that the agent had in fact no authority from the defendant, and that the plaintiff

had notice thereof. See further, *Ellis v. Schmæck*, 5 Bing. 521; *Parot v. Turton*, 2 Wils. 169; *Heane v. Rogers*, 9 B. & C. 577; *Crawshay v. Maule*, 1 Swanst. 518; *Story v. Lord Windsor*, 2 Atk. 630; *Jesus College v. Bloom*, 3 Atk. 262. The parties constituting a mining company occupy a dual position. As owners of the property, they are tenants in common; and in working the mine they are to be considered as partners. As the property can only be used in entirety, it is indispensable to the conducting of the business of mining that those owning the major portion of the property should have the power to control, in case all cannot agree; otherwise the work might become wholly discontinued. As mining partnerships are not usually founded on the *dictatus personæ*, the powers of the individual members of the concern are much more limited than are the powers of the individual members of a purely commercial or trading partnership; and for this reason the conduct of the partners holding the major portion of the property in a mining concern is to be most jealously scrutinized when complaint is made by the minority in interest, of oppression. It might and often would work great inconvenience and damage to the minority in interest of a mining partnership, if the majority were allowed to do as they might deem to their own advantage, regardless of the rights and interests of the minority. But notwithstanding the danger of the abuse of power in such cases, what may be necessary and proper for carrying on the business of mining for the joint benefit of all concerned must be determined by those owning and holding in the aggregate the major part of the property. And if the powers which are thus attempted to be exercised are not necessary and proper for the success of the enterprise, those whose interests are imperilled or disastrously affected thereby have the right to resort to the courts for redress and protection. *Dougherty v. Creary*, 30 Cal. 290. In *Crawshay v. Maule*, 1 Swanst. 518, Lord Eldon says: "Whatever may be the rights and liabilities of tenants in common of a mine not being worked, it is clear that where the several owners unite and co-operate in working the mine, then a new relation exists between them, and to a certain extent they are governed by the rules relating to partnerships, and this relation of partnership may be constituted either by express stipulation, or by implication deduced from the acts of the parties." *Fereday v. Wightwick*, 1 Russ. & M. 45; *Bradley v. Harkness*, 26 Cal. 76.

BOOK II.

PART VIII.

AGENCY.

1. AN AGENT'S CONTRACTS FOR A FOREIGN PRINCIPAL.

AN examination of the cases relating to agency will show that in some of its branches there is the same hopeless and irreconcilable confusion existing as characterized the cases in connection with the law of partnership prior to the decision of *Cox v. Hickman*.¹ This confusion has largely arisen from the adoption of arbitrary rules as deductions from special cases; wider scope and a more general application being given to such rules than has been warranted. In some cases a statement is made of limited application, which, in a later case, is enlarged, and is finally adopted as a "general rule," applicable not only to all precisely similar cases, but is received as a general principle, incorporated into and made of the very essence of the law which is to govern a general class of cases. This is well illustrated by the decisions connected with purchases made by an agent for a foreign principal. Story states that "the general rule obtains that agents or factors acting for merchants resident in a foreign country (as, for example, in France or Germany) are held personally liable upon all contracts made by them for their employers; and this without any distinction, whether they describe themselves in the contract as agents or not. In such cases the ordinary presumption is, that credit is given to the agents or factors, and not only that credit is given to the agents or factors, but that it is exclusively given them to the exoneration of their employers."²

The first case cited for this proposition is *DeGaillon v. L'Aigle*.³

¹ 8 H. L. C. 268.

² Story on Agency, § 268.

³ 1 B. & P. 358. This citation by Story is a miscitation. The case to which he refers is evidently *De Gaillon v. L'Aigle*, 1 B. & P. 368 (2d case). This was a case of improper evidence given on a writ of inquiry issued under the judgment in the previous case. The question as to the improper reception of the evidence having

been decided, Eyre, C. J., added: "I am not aware that I have ever concurred in any decision in which it has been held that if a person describing himself as agent for another residing abroad, enter into a contract here, he is not personally liable on the contract." This was purely extra-judicial; but out of this mainly grew the unsound statement as a legal principle, that, in effect, in contracts made by the

This case simply holds that if a wife trade and obtain credit in England as a *feme sole*, and her husband reside abroad, she is liable for her own debts; but not unless she represents herself as a *feme sole*. This case has not the most remote application to the matter for which it is cited as an authority. The *feme covert* is made liable in such case simply as the result of a necessity cast upon her for her support, otherwise she would obtain no credit, and would have no means of gaining her livelihood. It has no bearing whatever upon the question as to the liability of an agent on contract made by him for a foreign principal.

Paterson v. Gandasequi¹ comes slightly nearer, and very slightly so, towards the alleged general principle that the contracts of an agent for a foreign principal bind the agent, and bind him only, and not the principal. This was a case where agents bought goods in England for foreign principals, and Lord Ellenborough, being of opinion, from the fact that the plaintiffs had dealt with the agents upon their sole and individual credit, knowing that the purchases they made were on account of the defendant, directed a nonsuit. A rule *nisi* was granted for a nonsuit on the ground of assimilating the case of a dormant principal to that of a dormant partner, where, though the party furnishing goods to the ostensible partners intended at the time to give credit only to them, he might afterwards pursue his remedy against the dormant partner when discovered. The rule for a new trial was made absolute. Lord Ellenborough, C. J., deals with the question — which mark, is an action against foreign principals — without the slightest reference to that fact. He put it simply as a question as to whether what was done between the sellers and the agents was done with the knowledge of the defendant (a foreigner), being the principal, the *ratio decidendi* of the case, as well as the immediate effect of what Lord Ellenborough said, being, that if they were not aware of it, the defendant (the foreign principal) was liable. All of the judges lay down the law, without distinction, as between a home and foreign principal; making the sound general principle relating to agency virtually as applicable to the one case as to the other. Lord Ellenborough correctly lays down the law, thus: "The law has been settled by a variety of cases, that an unknown principal when discovered is liable on the contracts which his agent makes for him; but that must be taken with some qual-

home agent for a foreign principal, the agent was always liable, and the principal never so. Smyth v. Anderson, 7 C. B. 21, has been cited for the same proposition (see Bray v. Kettell, 1 Allen, 80, 82; per Bigelow, C. J.); but that case in effect

holds the reverse; holding, as it does, that the foreign principal was not liable, because he had paid the agent before a demand was made on him by the English seller of the goods for payment.

¹ 15 East, 62.

ification, and a party may preclude himself from recovering over against the principal by knowingly making the agent his debtor ;” intimating that it had appeared to him at the trial that the plaintiffs knew of the defendant being the principal, and had elected to take the agents as their debtors, or he should not have nonsuited the plaintiffs ; but he thought that, as there might be a doubt upon the evidence, whether the plaintiffs had a perfect knowledge of that fact, it might be well to have it reconsidered.

The same idea was the leading one in the minds of the other judges. Grose, J., thought that the plaintiffs might have elected whom they would have for their debtor, and that they seemed to have made their election ; adding : “ That, however, is the *only doubt* which is fit to be considered.” Le Blanc, J., said : “ It will be material to have the facts inquired into more fully, in order to ascertain whether the tradesmen sold to the agents with a knowledge of the party for whom they were buying ; or whether, without such knowledge, they chose to give credit to the agents, whether buying for another or for themselves.” And Bayley, J. : “ I have generally understood that the seller may look to the principal when he discovers him, unless he has abandoned his right to resort to him. I agree that where the seller knows the principal at the time, and yet elects to give credit to the agent, he must be taken to have abandoned such right, and cannot, therefore, afterwards charge the principal. I think it should be considered in this case whether the plaintiffs did so.”

Neither Lord Ellenborough nor Grose, J., made the slightest reference to the question as to the defendant being a foreign principal, and the only references made to the matter at all were hypothetical. Thus Le Blanc, J., says : “ It may be necessary to consider in the present case whether any distinction can be made between a home and a foreign principal.” And Bayley, J. : “ There may be a particular course of dealing with respect to trade in favor of a foreign principal, that he shall not be liable in cases where a home principal would be liable. That would be a question for the jury.” Whether there was such a course ? A question of fact for the jury ; not a principle of law. Had this been, as stated by Story and in some of the later cases, a principle of law, the nonsuit in the action against the foreign principal could not have been set aside. This is the second of the cases cited by Story to sustain the statement of principle of law quoted above.

The case of *Addison v. Gandassequi*¹ is a case very similar to *Paterson v. Gandassequi*,² and is usually cited in the same connection. This case simply decides that a man selling to another

¹ 4 Taunt. 574.

² 15 East, 62.

for the use of a third, who stands by and is known, may make the contract with the buyer without making the third person responsible. It was only on this principle that the defendant (the foreign principal) was held not personally liable on the contract made by his agent.

*Thomson v. Davenport*¹ is a case slightly different from these preceding cases, which we have examined. Here all the judges concurred in laying down the law, as a general rule, that if a person sells goods, supposing at the time he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the mean time have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if at the time of the sale the seller knows not only that the person who is nominally dealing with him is not principal but agent, but also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him and with him alone, then the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other. *Thomson v. Davenport*¹ establishes the additional proposition that where the seller at the time of making the sale knows that there is a principal, mere knowledge that there is a principal does not destroy the right of the seller to look to the principal as soon as he knows who that principal is, provided he did not know who he was at the time when the purchase was originally made.

References are made in this case to the presumption that where an agent makes a contract for a foreign principal, the intention is that he alone should be bound; but this is a presumption of fact, and is liable to be rebutted by very slight circumstances, showing that it was not the intention of the seller to look solely to the agent. Although the cases are by no means consistent with each other, we think the better holding is as stated by Cowen, J., in *Tainter v. Prendergast*,² where, referring to *Thomson v. Davenport*,¹ he makes this distinction: "It will be seen by this case and others referred to by it, that the usual and decisive indication of an exclusive credit is, where the creditor knows there is a foreign principal, but makes his charge in account against the agent. If the seller be kept in ignorance that he is selling to an agent or

¹ 9 B. & Cr. 78.

² 3 Hill, 72, 73.

factor, I am not aware of a case which denies a concurrent remedy. On the other hand, I am still in want of an authority that, where an agent acquires rights in a course of dealing for his principal, whether the latter be foreign or domestic, and his name is kept secret, the principal may not sue to enforce those rights. I admit that the defendant is not, by such form of action, to be cut off from any equities he may have against the agent. So far the latter is considered as the exclusive principal; but no further. As a general rule, the latter cannot maintain an action in his own name at all; and the exception will be found to arise from cases where he has the rights of bailee or some other *rights*; not the mere powers of a naked agent."

Nelson, C. J.,¹ goes still further. He says: "There can be no doubt, a person acting as agent of a foreign house is not responsible, individually, if he discloses his principal, and acts only in his behalf, any more than an agent of a house in this country. There is no such distinction to be found of any authority in the books, nor is there any reason to support it. If an individual desire the personal credit and liability of the agent, he should make known the fact, and all parties will then understand it. If the agent declines, the vendor can refuse to deal with him." This view was sustained on error from the Supreme Court. We find, on examining the case, that the large majority of the court took virtually the same view of Story's statement of the law as we have done. Verplanck, Sen., voicing their views, said: "I am satisfied that Judge Story has stated the doctrine in too strong and unqualified terms, as if this presumption were a universal inference of law, applicable everywhere. I think, on the contrary, that this is a presumption founded altogether upon usage and the particular course of trade, and arises only when and where that usage is known or proved to exist. Of course, then, that is not an unvarying legal presumption, to be applied to any contract, made anywhere, by a factor or agent representing a person or commercial house in some foreign country."²

The presumption of fact that there is in the matter, has, without doubt, arisen from the custom of many foreign principals ordering goods from English factors or commission merchants, the latter buying the goods in their own name and on their own credit, charging their foreign customers with a commission for so doing. But,

¹ In *Kirkpatrick v. Stainer*, 22 Wend. 244, 246.

² *Kirkpatrick v. Stainer*, 22 Wend. 244, 259. In this case, Kent, Ch., in delivering the dissenting judgment of himself and the minority of the court, quoted from *Smith's Mercantile Law*, (see *infra*) and

Story's Agency, the rule of law in the matter, as laid down by them, which he indorsed. It is noteworthy, however, that in his Commentaries he lays down no such doctrine as he attempted to establish in *Kirkpatrick v. Stainer*, 22 Wend. 244, 251.

on the other hand, the instances are numerous where foreign merchants have their resident agents in England, who buy goods for their principals, not as principals themselves, but in the capacity of agents only, without any thought by either of the parties of any other being responsible on the contract than the principals. The same remark applies to the chartering of ships; ships being largely chartered in England by agents for foreign principals, without any liability being incurred in law or in fact by the home agents. The whole matter is simply one of contract — of intention.

We notice also, that Smith, who, in his *Mercantile Law*,¹ taking very much the same position as Story, said: "It seems, also, to be a rule that whenever the agent is an English, and the principal a foreign merchant, the seller will be considered as having given credit to the Englishman, and that he, and not the foreigner, is liable;" in his *Leading Cases*² abandons that view. He says: "It is conceived that there is no difference *in point of law* between the case of an agent contracting on behalf of an English or foreign principal. In each case it is a question as to the intention of the parties to be collected from the facts, and the circumstance of the principal being foreign may be sometimes considered as of great weight in the determination of that question. Thus, on an ordinary sale and purchase of goods in this country, it is, perhaps, not an unreasonable *inference of fact* that the parties residing here are looked to as principals, where there is no stipulation to the contrary; and the usage of the particular trade will probably in many cases furnish a guide to a decision of this question."

Bigelow, C. J., in *Bray v. Kettell*,³ in dealing with this same question, after referring to the alleged rule, and to its origin in a local custom or usage, added: "But it is going quite too far to say that this usage or custom is so ingrafted into the common law as to become a fixed and established rule, creating a presumption in all cases that the agent is exclusively liable; to the entire exoneration of his employer. The more reasonable and correct doctrine is that when goods are sold to a domestic agent or a contract is made by him, the fact that he acts for a foreign principal is *evidence only* that the agent, and not the principal, is liable. It is in reality, in all cases, a question to whom the credit was in fact given. Where goods are sold, it is certainly reasonable to suppose that the vendor trusted to the credit of a person residing in the same country with himself, subject to laws with which he is familiar, and to process for the immediate enforce-

¹ Page 138, 3d ed.

² Vol. ii. p. 418, 2d ed.

³ 1 Allen, 80, 83.

ment of a debt, rather than to a principal residing abroad, under a different system of laws, and beyond the jurisdiction of the domestic forum. But even in such a case, the fact that the principal is resident in a foreign country is only one circumstance entering into the question of credit, and is liable to be controlled by other facts. So in the case of a written contract; it depends on the intention of the parties. But this, as in all other cases of written instruments, must be determined mainly by the terms of the contract. There may be cases where the language of the contract is ambiguous, and it is doubtful to whom the parties intended to give credit, in which the circumstance that the principal is resident abroad may be taken into consideration in determining the question of the liability of the agent. But where the terms of the contract are clear and unambiguous, it must be deemed the final repository of the intention of the parties; and its construction and legal effect cannot be varied or changed by any reference to facts or circumstances affecting the convenience of the parties or the reasonableness of the contract into which they have entered. In such a case, therefore, it makes no difference whether the principal is a foreigner or not. If by the language of the contract the agent and not the principal is bound, such must be its construction; and, on the other hand, if it clearly binds the principal, and is in form a contract with him only, the agent must be exonerated without regard to the fact that the principal is resident in a foreign country.¹ This rule can work no hardship, because parties

¹ The plaintiffs, a foreign company, entered into negotiations through S. & Co., London, commission merchants, for the supply by C., the defendant, of certain railway wheels and axles; and the defendant, in consequence, had an interview, on the 29th January, at S. & Co.'s office, with S., one of the partners, and H., the managing director of the plaintiffs' company; and the defendant signed, in a diary of S., the following entry: "Mr. C. offers to supply 150 sets of wheels and axles [describing them] at £31 per set, to be delivered free on board at Hull during February and March. This offer to remain open until the 3d of February." On the 3d of February S. & Co. telegraphed and wrote: "We confirm the order for 150 sets of wheels and axles," repeating the terms of the offer. Some of the sets were delivered by the defendant, the invoices being made out to S. & Co., and they paid for them; but the delivery of most of the sets was after March, and the plaintiffs sued for a breach of the contract. At the trial it was objected that the contract was with S. & Co., and not with the plaintiffs. The judge (Mellor) left it to the jury to

say whether the contract was made with the plaintiffs or with S. & Co. The jury found that it was made with S. & Co. On motion for a new trial, on the ground of misdirection, and that the verdict was against the weight of evidence, the court held that the direction and verdict were right. The principle upon which the case was decided is, that an agent may make a contract by which he may become personally liable, while he still makes it on behalf of his principal, so that the other party has a choice to go against either the one or the other; that is, that the contract may be such as to make the principal, as well as the agent himself, a party to the contract. But if the principal be made a party to the contract, he must be both able to sue and liable to be sued; for he cannot be a party so as to be able to sue, and yet not a party so as not to be liable to be sued. *Elbinger Actien-Gesellschaft v. Claye*, L. R. 8 Q. B. 313. And in this case the court considered that the evidence excluded the one altogether, because the foreign principal was known to the defendant, and, in fact, was present at the time of the offer; and that the jury

can in all cases make their contracts in such form as to bind those to whom they intended to give credit. . . There can be no doubt

found in substance (and their finding was sustained), that what the defendant in effect said, was: "I know the goods are not for you, S. & Co., but I will not deal with your foreign principal, but only with you;" and that being so, the foreigner is excluded, both for the purpose of liability, and for the purpose of suing and taking the benefit of the contract. *Hutton v. Bulloch*, L. R. 8 Q. B. 331, is a case similar in principle to *Elbinger Co. v. Claye*, L. R. 8 Q. B. 313, and carried the principle that the presumption (whether it be an inference of fact or a conclusion of law) that foreign constituents do not give the English commission merchant any authority to pledge their credit to those from whom the commission merchant buys on their account, to a case in which a foreign firm agrees that an English firm shall purchase and ship goods on the joint account of the two firms. The question came up in the Court of Queen's Bench on a case stated by consent. In this case the action was against the foreign principal; and the facts were that H. F. & Co. were merchants in London, and the defendant was a partner in the firm of H. B. & Co., carrying on business at Rangoon. Goods were supplied by plaintiff to H. F. & Co. on their order, given in consequence of an arrangement between the two firms, as disclosed in letters, that H. F. & Co. should purchase and send out goods on the joint account of the two firms, 2 per cent. to be charged on the invoice by the London firm, and 5 per cent. by the Rangoon firm, including guarantee. The plaintiff had no knowledge of the defendant, or that the Rangoon firm were in any way interested in the transaction, until after the goods were supplied. The judgment of the court was delivered by Blackburn, J., in favor of the defendant. On appeal to the Court of Exchequer Chamber (L. R. 9 Q. B. 572), the judgment of the Court of Queen's Bench was affirmed, both courts holding that the defendant was not, as an undisclosed principal, a party to the contract under which the goods were supplied by plaintiff; for that, on the true construction of the correspondence, the Rangoon firm did not give authority to the London firm to establish privity of contract, and pledge their credit with the English suppliers of the goods, inasmuch as the presumption that foreign constituents do not give the English commission merchant any authority to pledge their credit to those from whom the commission merchant buys on their account,

applies to such a case. The question incidentally arose in this case, in the court below, whether the conclusion arrived at is an inference of fact or a conclusion of law. It would seem to be that, in reaching the conclusion, it would be, as is the case in the construction of most contracts, a mixed question of fact and of law. Blackburn, J., who delivered the judgment in this case in the Court of Queen's Bench, where the point is referred to, himself showed, in *Elbinger Co. v. Claye* (L. R. 8 Q. B. at p. 317 *et seq.*), that although the usage of trade established for many years has been that it is understood that the foreign constituent has not authorized the merchants to pledge his credit to the contract, to establish privity between him and the home supplier; yet that, on the other hand, the home supplier, knowing that to be the usage, does not trust the foreigner, and so does not make the foreigner responsible to him, nor himself responsible to the foreigner, *unless there is something in the bargain showing the intention to be otherwise*; and admits that there might, no doubt, be a contract made in a different way between the two parties bargaining together, and there might be evidence of that given to a jury. In *Hutton v. Bulloch*, Maule, J.'s statement, in *Smyth v. Anderson* (7 C. B. at p. 33; 18 L. J. C. P. 109), is quoted, where he says: "It is well known, in ordinary cases, where a merchant resident abroad buys goods here through an agent, the seller contracts with the agent, and there is no contract or privity between him and the foreign principal. If that question had been specifically put to the jury, there can be no doubt as to what their decision would have been." And this is also quoted from the judgment in *Armstrong v. Stokes*, L. R. 7 Q. B. at p. 605: "The great inconvenience that would result if there were privity of contract established between the foreign constituents of a commission merchant and the home suppliers of the goods has led to a course of business, in consequence of which it has long been settled that a foreign constituent does not give the commission merchant any authority to pledge his credit to those from whom the commission merchant buys them by his order and on his account. It is true that this was originally (and in strictness perhaps still is) a question of fact; but the inconvenience of holding that privity of contract was established between a Liverpool merchant and the grower of every bale of cotton which is forwarded to him in consequence of his

that if the principal resided in this country, he alone could have been sued on the contract. In like manner, he only is responsible, although a foreigner, because he is the sole party to it, and there is nothing to control the intent manifested by this mode of executing the contract."

This is altogether like the usual judgments of Bigelow, C. J., an admirable exposition of the law; every word of which we adopt. It was held, in accordance with the language we have quoted, where a charter-party had been entered into by the defendant, for foreign principals, and the agent, having due authority to do so, signed the charter-party, "A. B. by C. D., agent," that the agent was not liable on the contract, although the principals resided beyond seas.¹

order given to a commission merchant at New Orleans, or between a New York merchant and the supplier of every bale of goods purchased in consequence of an order to a London commission merchant, is so obvious and so well known, that we are justified in treating it as a matter of law, and saying that, in the absence of evidence of an express authority to that effect, the commission agent cannot pledge his foreign constituent's credit." The deduction from these cases would seem to be, in England, that, whether there is any evidence to submit to the jury as to the intention of the parties contracting mutually to bind the foreign principal and the home dealer to each other, as parties to the contract, on principle as well as on authority, is, of course, a question of law. Where there is such evidence, the intention of the parties would, with equal clearness, be a question of fact to be submitted to a jury, the jury being instructed that the burden of proof is on him who seeks to establish the privity of contract between the foreign principal and the home dealer. And where there is no evidence of such mutual intention between the parties, from long usage, which has now ripened into a principle of law, the conclusion is that it is now a principle of law, that the foreign principal and the home dealer do not contract with each other, but that there are two independent contracts, — the foreign dealer with the commission merchant, and the home dealer with the commission merchant as well; the commission merchant being the principal in both cases, as between himself and the foreign dealer, and himself and the home dealer respectively. This, of course, is simply the result of usage, in the entire absence of any evidence to show the intention of the parties.

¹ See further on the point, Lennard v. Robinson, 5 El. & B. 125, 130; Mahony

v. Kekulé, 14 C. B. 390; Green v. Kopke, 18 C. B. 549; Heald v. Kenworthy, 10 Ex. 739, 743, *per* Parke, B.: "The question of the liability is one of fact. Where the seller deals with an agent resident in this country and acting for a foreign principal, the presumption is that the seller does not contract with the foreigner and trust him, but with the party with whom he makes the bargain. This is a question of fact, and not of law." See also Wilson v. Zulueta, 14 Q. B. 405, 416; Oelricks v. Ford, 23 How. 49, 65; Risbourg v. Brackner, 3 C. B. N. S. 812, 824. And see Rogers v. March, 33 Me. 106, 112, laying down the rule exactly as in Story's Agency, § 268. We observe that in the last edition of Story on Agency, p. 326, note 2, the editor abandons the principle laid down by the author in the text, and says: "But the true rule seems to be that an agent of a foreign principal is not, as a matter of law, personally liable on such contracts; but it is a question of fact for the jury in each case, to be decided by the peculiar circumstances, whether he is liable on the particular contract in each case." And yet in the recent English case of Paice v. Walker, L. R. 5 Ex. 173, 178, we find Cleasby, B., referring to the principle as laid down by Story in his Agency, and Smith in his Mercantile Law, as though its fallacy, as so broadly stated by them, had not been exposed, as it has been, over and over again. It goes to show, when once an erroneous proposition in law is established on the semblance of authority, how difficult it is to eradicate the error. Incidentally the matter is referred to further in the next section of this Part.

We think the mistake which has been made that there is a presumption, as a principle of law, that when a contract is made with a home agent for a foreign prin-

2. EFFECT OF AGENTS SIGNING CONTRACTS IN THEIR OWN NAMES.

As unsettled as the law has been with reference to the effect of a contract made by an agent for a foreign principal, and which we have considered in the preceding section of this Part, it was not more so than the law has been with reference to the subject we consider in this section. We examine some of the cases on the subject.

In *Paice v. Walker*,¹ which we examine more fully after stating some other cases, it was held that where a contract is signed by a person without any words importing agency, the person so signing is, by virtue of the contract, both entitled and liable, unless in the body of the contract a contrary intention is clearly shown. And in this case, where the agents signed the contract simply "*Walker & Strange*," they were held liable as principals, although, in the body of the contract, was: "*Sold P., London, 200 quarters wheat, as agents for J. S. & Co. of Danzig*," etc.; this language being held to be mere matter of description, and not showing that the contract was made by the agent for his principals for the purpose of binding them, and not himself. The decision in this case followed that of *Lennard v. Robinson*,² where the agents in London signed a charter-partur "*by authority of, and as agents for, S. of Memel*;" and, notwithstanding this, it was unanimously held by the Court of Queen's Bench, that this did not show that they were making the contract for S., but that the language in the body of the contract prevailed, which showed that the defendants were contracting for themselves.

It was sought by Cleasby, B., in *Paice v. Walker*,³ to put that

principal, the foreign principal is not liable on the contract, has arisen from the improper application of the general rule in the law of agency that the principal is liable for the contracts of his agent. There are limitations to that rule which include many cases where a foreign principal buys goods through a home factor or commission merchant; but they are based on the idea that the agent stands towards the seller of the goods and the purchaser of them as a kind of intermediate or *quasi* principal. We think where that relation exists the home principal is as much exempt from liability as the foreign principal is. The distinction that has been taken as regards the foreign principal is simply, we think, the result of a misconception as to what the rule is as to the liability generally of a principal on a contract which has been made by the agent in his own name and on his own credit. We think the cases of *Smyth v. Anderson*, 7 C. B. 21, and *Armstrong v. Stokes*, L. R. 7 Q. B. 598, as il-

lustrative cases, are very important on this question. The former was the case of a foreign principal, and the latter that of a home principal, and in both the principal was held not liable—but only in both cases because the principal had paid the factor—on the contract of his "agent" (more properly in such cases a principal or *quasi* principal), the "principal" having in good faith paid the "agent," before notice was given to him, or application was made to him by the seller. See *post*, where we consider the general question, in our note to *Armstrong v. Stokes*, L. R. 7 Q. B. 598. The general question itself is involved in such confusion, which we have endeavored to remove, that it is not strange that one of its collateral questions should not be conspicuous for clearness.

¹ L. R. 5 Ex. 173. —

² 5 El. & Bl. 125.

³ L. R. 5 Ex. 173, 178.

case very strongly on the ground that it was a contract for a foreign principal, and that, therefore, the broker was liable. He says: "I do not object at all to the view expressed by the rest of the court, but I am not disposed to reject or to give less than considerable weight to the fact that this contract shows on the face of it that it was made on account of a foreign principal. It is laid down in Buller, N. P., p. 130, that 'where a factor to one beyond sea buys or sells goods for the person to whom he is factor, an action will lie against or for him in his own name; for the credit will be presumed to be given to him in the first case, and in the last the promise will be presumed to be made to him, and the rather so as it is much for the benefit of trade;' the author only qualifies this by adding that there is, nevertheless, a contract also with the principal. In an old case of *De Gaillon v. L'Aigle*,¹ Eyre, C. J., says: 'I am not aware that I have ever concurred in any decision in which it has been held that if a person, describing himself as agent for another residing abroad, enters into a contract here, he is not personally liable on the contract.' The same view is adopted and expressed in Story on Agency, §§ 400, 401, and in Smith's Mercantile Law, p. 164 (7th ed.) . . . If the principles I have referred to are applied here, the defendants, who have signed in their own name, without any qualification, must be held to have contracted personally." Pigott, B., lays less stress on it, treating it as one of the circumstances to be taken into consideration in the case in construing the contract. He says, first quoting from Cresswell, J., in *Cooke v. Wilson*:² "'*Primâ facie* when a man signs a contract in his own name, he is a contracting party; and there must be something very strong upon the face of the instrument to prevent that liability from attaching to him.' That applies to the present case. Then is there anything in the body of the contract to relieve the defendants from their liability? The words relied on are, 'as agents for John Schmidt & Co. of Danzig.' Now, in *Lennard v. Robinson*,³ it was said by Coleridge, J., that the fact that the defendants were acting for a foreign principal, was a circumstance to be taken into consideration. In my judgment, taking into consideration that circumstance, which also appears in this contract, and the further fact that the cargo is to be taken, not at Danzig but at London (etc.), the defendants must be held, on the true construction of the contract, to have contracted personally with the plaintiff." No stress whatever was laid upon it by Martin, B. (who merely refers to it *en passant*), who says: "I infer . . . that the name of their foreign principals

¹ 1 B. & P. 368.² 1 C. B. N. S. 153, 162.³ 5 E. & B. at p. 131; 24 L. J. Q. B. at p. 277.

was inserted merely as a notice to the other contracting party, or an earmark of the contract, to distinguish it as one made by them in pursuance of their commission or agency." But Kelly, C. B., went still further, and said: "In dealing with the case, I do not rely on the circumstance that the alleged principals appear on the face of the contract to be foreigners resident abroad. When that circumstance appears in the contract, it may or may not have the effect contended for. *I place no reliance on it.*" This, of course, means in this particular case, not that the learned chief baron never placed any reliance on it.

In *Gadd v. Houghton*,¹ in the Court of Appeal, where, on the face of the contract, the names of the foreign principals are disclosed, — "Sold to you on account of James Morand & Co., Valencia," — the fact of the contract having been made by the agent so as to bind himself personally, because the contract disclosed that it was made for foreign principals, is not even adverted to in the most remote way by either of the learned judges who decided that case. We consider this case further.

The question decided in *Paice v. Walker*² came up again, in effect, in the Court of Appeal, in *Gadd v. Houghton*,³ which was an action for non-delivery of oranges sold by the defendants to the plaintiff. The sold note contained these words: "We have this day sold to you on account of James Morand & Co., Valencia," etc., and was signed by the defendants, "J. C. Houghton & Co.," without any addition. The contract not having been performed, the plaintiff brought an action against the defendants. It was claimed for them on the trial, before Pollock, B., that, upon the contract, Morand & Co., and not the defendants, were liable. A verdict was entered for the defendants, with leave for the plaintiff to move to enter it for him, on the ground that the defendants were personally liable on the contract. The Exchequer Division, on motion, so ordered, on the ground that the case was undistinguishable from *Paice v. Walker*. On appeal to the Court of Appeal,⁴ this decision was reversed. As far as the ground upon which *Paice v. Walker* was expressly decided, as we have shown above, it is clear that that case is overruled by *Gadd v. Houghton*. In this latter case, James, L. J., said: "As to *Paice v. Walker*, I cannot conceive that the words 'as agents' can be properly understood as implying merely a description. The word 'as,' seems to exclude that idea. If that case were now before us, I should hold that the words 'as agents,' in that case, had the same effect as the words 'on account of,' in the present case, and

¹ 1 Ex. Div. 357.

² L. R. 5 Ex. 173.

³ 1 Ex. Div. 357.

⁴ *Gadd v. Houghton*, 1 Ex. Div. 357.

that the decision in that case ought not to stand. I do not dissent from the principle that a man does not relieve himself from liability upon a contract by using words which are intended to be merely words of description, but I do not think the words ‘as agents,’ were words of description.”

The language in *Paice v. Walker*, is: “Sold . . . *as agents for John Schmidt & Co.*, of Danzig.” That in *Gadd v. Houghton*, is: “Sold *on account of James Morand & Co.*, Valencia.” All of the other judges (Mellish, L. J., Baggallay, L. J., Quain and Archibald, JJ.) concurred with James, L. J., that “*as agents*” in the one case, and “*on account of*” in the other, were, in effect, the same; and as far as *Paice v. Walker* is decided adversely to *Gadd v. Houghton*, on this point, as far as the use of the language named is concerned—and it was expressly decided on that ground—we think it has been clearly overruled. And yet we think that *Paice v. Walker* is not overruled by *Gadd v. Houghton*. James, L. J., notwithstanding what we have quoted from him above, and although Pollock, B., in *Hough v. Manzanos*,¹ states that he was unable to appreciate the distinction drawn by James, L. J., between the two cases, but that that distinction left *Paice v. Walker* an authority binding upon him,—does, very clearly, and we think, on very good grounds, distinguish *Paice v. Walker* from *Gadd v. Houghton*. The language of James, L. J., is: “The case is not, in my opinion, in any way governed by *Paice v. Walker*, for whatever the decision was in that case upon the words ‘as agents,’ the words in the present case, ‘on account of,’ are not at all ambiguous, and it would be impossible to make them words of description. The *ratio decidendi* in *Paice v. Walker*, was that, HAVING REGARD TO THE CONTRACT AND ALL THE CIRCUMSTANCES OF THE CASE, *the words ‘as agents’ must be considered as merely describing or intimating the fact that the defendants were agents, and did not amount to a statement that they were making a bargain ‘on account of’ another person.* Those are the very words used in the present case. When a man says that he is making a contract ‘on account of’ some one else, it seems to me that he uses the very strongest terms the English language affords to show that he is not binding himself, but his principal.” Both of these apparently antagonistic views are, also, to be found in the judgment of Mellish, L. J. He expressly concurs in the whole judgment of James, L. J. He adds: “As is said in the note to *Thomson v. Davenport*,² when a man signs a contract in his own name, he is *primâ facie* a contracting party and liable, and there must be something very strong on the face of the instrument to show that the liability does not

¹ 4 Ex. Div. 104.

² 2 Sm. L. C., 6th ed., 344.

attach to him. But if there are plain words to show that he is contracting on behalf of somebody else, why are we not to give effect to them? I can see no difference between a man writing 'I, A. B., as agent for C. D., have sold to you,' and signing 'A. B. ;' and his writing 'I have sold to you,' and signing 'A. B., for C. D., the seller.' When the signature comes at the end, you apply it to everything which occurs throughout the contract. If all that appears is that the agent has been making a contract on behalf of some other person, it seems to me to follow of necessity that that other person is the person liable. This is one of the simplest possible cases. How can the words 'on account of Morand & Co.' be inserted merely as a description? The words mean that Morand & Co. are the people who have sold. It follows that the persons who have signed are merely the brokers, and are not liable."

All this is quite as applicable to "sold as agents for J. S. & Co.," as it is to "sold on account J. M. & Co." And yet the very next words of Mellish, L. J., are: "I agree also *that the circumstances of Paice v. Walker are to be distinguished from the present.*" And Quain, J.: "It is said that in order to relieve the agent from liability, he must sign 'as agent,' or 'on account of' [treating these, as do the other judges, as, in effect, virtually synonymous] Morand & Co. I cannot see the necessity for adding those words to the signature, if you can gather from the contract that he makes it on account of Morand & Co. Those words at the end of the signature would add nothing to what has been stated in the body of the contract. The agent, therefore, does not render himself personally liable by not adding them." And Archibald, J.: "I am of the same opinion. The usual way in which an agent contracts so as not to render himself personally liable, is by signing as agent. That, however, is not the only way, because *if it is clear from the body of the contract that he contracted only as agent*, he would save his liability. No words could be plainer than the words 'on account of Morand & Co.,' to show that the defendants contracted only as agents." And yet, although all this is equally as applicable, in effect, to the language referred to in *Paice v. Walker* as it is to that in *Gadd v. Houghton*, he, too, like the other able judges, adds: "*I also agree that Paice v. Walker is to be distinguished from this case.*"

We think the rules of law, fairly deducible in the matter, are:—

First. When a man signs a contract in his own name, he is *primâ facie* a contracting party and liable, and there must be something very strong on the face of the instrument to show that the liability does not attach to him.

Second. When a man signs his name to a contract and does not add to his signature any language to the effect that he is acting as the agent or on account of any one else ; but does show, in the body of the contract, that he is acting as the agent or on account of some one else, and there is nothing otherwise in or connected with the contract which shows that this is not merely matter of description, then he is not the contracting party and is not liable.

Third. But, though not signing his name as the agent, or as acting on account of any one else, and yet stating in the body of the contract that he is acting as the agent, or on account of some one else, and there is that in and connected with the contract which shows that such statement is merely matter of description, then he is the contracting party and is liable.

With all deference, we think, — although the term “*sold on account of J. M. & Co.*,” in *Gadd v. Houghton*, may be appreciably stronger than its very near equivalent, “*sold as agent of J. S. & Co.*,” in *Paice v. Walker* — that either of these expressions may come within the third rule we have above deduced from the cases. But, “having regard to the contract and all the circumstances of the case,” there is nothing whatever in *Gadd v. Houghton* which does show that the term “on account of J. M. & Co.” is matter of description ; while in *Paice v. Walker*, having regard to the contract and all the circumstances of the case, there is something to show that the term “as agent of J. S. & Co.” was merely matter of description. And one very strong thing to show that the defendants in this case (and which, doubtless, had its effect on the opinions expressed by the very able judges of the Exchequer Chamber) did use that language — “sold as agents of J. S. & Co.” — merely as matter of description, is that, in that case, they themselves acted as principals — as sellers — in connection with the contract. Kelly, C. B., incidentally refers to this,¹ where, referring to what “afterwards passed between the parties,” he says : “By which it appears that the defendants, so far from denying that they were parties to the contract, acted as sellers by drawing upon the plaintiffs in their own name.” Then, in the contract, while, in connection with the *sale*, they describe themselves “as agent for J. S. & Co.,” they enter into a guarantee without any intimation that they are doing so “as agents of J. S. & Co.,” and that is part of the contract signed by them. And, in the contract, they say that the payment is “by buyers’ acceptance to sellers’ drafts,” and, not only, as intimated by Kelly, C. B., did they, in drawing in their own names, act as sellers, but by so doing, in

¹ *Paice v. Walker*, L. R. 5 Ex. at p. 176.

effect, they declared that they were the sellers. And this draft which, as sellers, they drew, was accepted, and paid to them as sellers; and, in further recognition of this as being according to the contract an acceptance and payment to them as sellers (and therefore, of course, principals), the shipping papers and the goods purchased were — in recognition that in treating them as sellers, the plaintiffs had a right to do so — handed over by the thus professed and acting sellers, to the buyers. None of these circumstances or any at all analogous to them are to be found in *Gadd v. Houghton*, which, “having regard to the contract and all the circumstances of the case,” in *Paice v. Walker*, does not overrule the latter case in respect to that contract and those circumstances.

Where, in *Fairlie v. Fenton*,¹ the words were, “sold you on account of T.,” signed “E. F., broker,” and where the same judges sat who decided *Paice v. Walker*, — Kelly, C. B., makes a general statement covering these cases; thus: “A broker may, no doubt, frame a contract in such a way as to make himself a party to it and entitled to sue, *but when he contracts in the ordinary form, describing and signing himself as a broker, and naming his principal*, no action is maintainable against him.”

The ordinary rule undoubtedly is, that if a person merely adds to the signature of his name the word “agent,” “trustee,” “treasurer,” etc., without disclosing his principal, he is personally bound. The appendix is regarded as a mere *descriptio personæ*. It does not of itself make third persons chargeable with notice of any representative relation of the signer. But if he be in fact a mere agent, trustee, or officer, of some principal, and is in the habit of expressing, in that way, his representative character in his dealings with a particular party, who recognizes him in that character, it would be contrary to justice and truth to construe the documents thus made and used as his personal obligations contrary to the intent of the parties.²

The plaintiff made two contracts in writing with the defendants, in his own name, describing himself as agent for H. & Co., and signing the contract with his own name, without any addition. The contract referred to him as “the seller,” and also contained the language: “I . . . agree to sell.” The purchasers were of New York, where the contract was to be performed. By statute

¹ L. R. 5 Ex. 169.

² *Metcalf v. Williams*, 104 U. S. 93; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; *Brockway v. Allen*, 17 Wend. 40; *Kean v. Davis*, 21 N. J. Law, 683. See *Nat. Bank v. Ins. Co.*, 104 U. S. 54, where a bank was charged with knowledge of the fact that funds which

were deposited by one of its customers in his own name were in fact deposited by him as the agent of an insurance company, so that their lien as bankers would not attach to such funds as against advances made to him by the bank on his personal account.

there, in the case of contracts made by one in his own name for the benefit of another, the party making the contract is a trustee of an express trust, and an action on the contract may be brought in his own name.¹ Independent of the statute, the court recognized the strength of the authorities in favor of the right of the plaintiff to sue, in his own name, at common law,² but held³ that, if the agreement were a personal contract, the action could be in his own name at common law, and if a contract for H. & Co., the action could be brought in New York, in his own name, under the statute.⁴ Quite independent of the statute, we have no doubt that, under the form of the contract, the action was properly brought in the name of the plaintiff.⁵

The plaintiffs bought flour from the defendants, for which the following note was given : —

MESSRS. TOWNE & WASHBURNE : —

Bought of Nash & Chapin, general commission merchants, 1000 barrels of flour, Empire Mills, Iowa, round hoop, 5½, \$5,500.

Received payment, sight draft,

NASH & CHAPIN.

This note of the sale was enclosed in a letter from the defendants, to the plaintiffs, containing the following language : “ Your Mr. W. left here yesterday, and before going off we sold him 1000 barrels round hoop flour, Empire Mills, Iowa, free on board steamer at Neenah, \$5.50, for which find bill enclosed. We have the flour stored and insured, and will value on you at sight for the amount.”

In an action for non-delivery of the flour, the defendants sought to give evidence that they had sold the flour as agents, and had paid over the proceeds thereof to their principals. The presiding judge of the Circuit Court refused to allow the evidence, and on error to the Supreme Court,⁶ the ruling was sustained ; the principles applicable to the point being thus correctly stated : “ Parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he disclosed his agency and mentioned the name of his principal at

¹ N. Y. Code of Civil Procedure, § 449.

² Kennedy v. Gorveia, 3 D. & R. 503 ; Parker v. Winslow, 7 E. & B. 942 ; Dutton v. Marsh, L. R. 6 Q. B. 361 ; Buffum v. Chadwick, 8 Mass. 103 ; Packard v. Nye, 2 Met. 47.

³ Albany & Rensselaer Co. v. Lundberg, 121 U. S. 451.

⁴ Considerant v. Brisbane, 22 N. Y. 389 ; Sawin v. Kenny, 93 U. S. 289 ; Weed Sewing Machine Co. v. Wicks, 3 Dill. 261 ; United States v. Tracy, 8 Bened. 1.

⁵ In the case of a contract made by an

agent for his principal, the contract showing on its face the name of the contracting parties, the agent may either sign his own name first, and add to it agent for his principal, or he may sign the name of his principal first, and add by himself, as agent. Either form may be followed. All that is required in such case is that the contract shall purport on its face to be the contract of the principal. Smith v. Morse, 9 Wall. 76, 82.

⁶ Nash v. Towne, 5 Wall. 689.

the time the contract was executed.¹ Where a simple contract, other than a bill or note, is made by an agent, the principal whom he represents may, in general, maintain an action upon it in his own name, and parol evidence is admissible, although the contract is in writing, to show that the person named in the contract was an agent, and that he was acting for his principal. Such evidence, says Baron Parke, does not deny that the contract binds those whom on its face it purports to bind, but shows that it also binds another, and that principle has been fully adopted by this court.² Cases may be found, also, where it is held that the plaintiff may prove by parol that the other contracting party named in the contract was but the agent of an undisclosed principal, and in that state of the case he may have his remedy against either at his election.³ Evidence to that effect will be admitted to charge the principal or to enable him to sue in his own name, but the agent who binds himself is never allowed to contradict the writing by proving that he has contracted only as agent, and not as principal."⁴

¹ *Higgins v. Senior*, 8 M. & W. 844.

² *New Jersey Steam. Nav. Co. v. Merchants' Bank*, 6 How. 381; *Ford v. Williams*, 21 How. 239; *Oelricks v. Ford*, 23 How. 63.

³ *Thomson v. Davenport*, 9 B. & C. 78.

⁴ *Jones v. Littleale*, 6 A. & E. 486; *Titus v. Kyle*, 10 Ohio St. 414.

The question arose in *Ford v. Williams*, 21 How. 287, whether the principal can maintain an action on a written contract, made by an agent in his own name, without disclosing the name of the principal, and the Supreme Court of the United States, in deciding that he could, thus laid down the principles applicable to the question: "It is not necessary to the validity of a contract, under the statute of frauds, that the writing disclose the principal. In the brief memoranda of these contracts usually made by brokers and factors, it is seldom done. If a party is informed that the person with whom he is dealing is merely the agent for another, and prefers to deal with the agent personally on his own credit, he will not be allowed afterwards to charge the principal; but when he deals with the agent, without any disclosure of the fact of his agency, he may elect to treat the after-discovered principal as the person with whom he contracted. The contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein; and notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the prin-

cipal may show, that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction. But the agent who binds himself will not be allowed to contradict the writing by proving that he was contracting only as agent, while the same evidence will be admitted to charge the principal. 'Such evidence,' says Baron Parke, 'does not deny that the contract binds those whom on its face it purports to bind, but shows that it also binds another by reason that the act of the agent is the act of the principal.'" See *Higgins v. Senior*, 8 M. & W. 843; *New Jersey Steam Nav. Co. v. Merchants' Bank* 6 How. 381; *Moore v. Clementson*, 2 Camp. 22; *Sims v. Bond*, 5 B. & Ad. 393; *Beebee v. Robert*, 12 Wend. 413; *Taintor v. Prendergast*, 3 Hill, 72; *Sanderson v. Lamberton*, 6 Binn. 129; *Fogg v. Virgin*, 19 Me. 353; *Trask v. Roberts*, 1 B. Mon. 202; *Bradly v. Boston Glass Co.*, 16 Pick. 32; *Magee v. Atkinson*, 2 M. & W. 440; *Sowerby v. Butcher*, 2 C. & M. 371; *Pentz v. Stanton*, 10 Wend. 277.

L. & Co., cotton brokers at Liverpool, sold to the appellants cotton for future deliveries. *L. & Co.* made the sales in their own names, but were really acting as agents for the respondent's insolvent, their undisclosed principal. The result of the transaction was that a sum of £680 was due by the appellants to *L. & Co.* *L. & Co.* having failed, the plaintiff brought an action against the appellants, who claimed to set off, in defence, money due

The defendants, M. and W., fruit brokers in London, being employed by the plaintiffs, merchants in London, to sell for them,

from L. & Co. to the defendants in general account. The defendants, in answer to interrogatories as to their belief, stated; "We had no belief on the subject. We dealt with L. & Co. as principals, not knowing whether they were acting as brokers on behalf of principals, or on their own account as the principals." At the trial, before Baggallay, L. J., it was proved that L. & Co. bought and sold both for principals and on their own account, and that the defendants knew this. Baggallay, L. J., held that the defendants were entitled to the set-off, and gave judgment for them. The Court of Appeal reversed this decision, and entered judgment for the plaintiff for the amount claimed, on the ground that the defendants were not entitled to the set-off unless they had been induced by the conduct of the principal to believe, and did in fact believe, that they were dealing with L. & Co. as the principals. On appeal to the House of Lords (*Cooke v. Eshelby*, 12 App. Cas. 271), the decision of the Court of Appeal was affirmed. In so deciding, Lord Halsbury, L. C., thus laid down the principle governing the case: "It appears to me that the principle upon which this case must be decided has been so long established, that, in such a state of facts, the legal result cannot be doubtful. The ground upon which all these cases have been decided, is that the agent has been permitted by the principal to hold himself out as the principal, and that the person dealing with the agent has believed that the agent was the principal, and has acted on that belief. With reference to both these propositions, namely, first, the permission of the real principal to the agent to assume his character, and with reference to the fact whether those dealing with the supposed principal have in fact acted upon the belief induced by the real principal's conduct, various difficult questions of fact have from time to time arisen; but I do not believe that any doubt has ever been thrown upon the law as decided by a great majority of judges for something more than a century. . . . The selling by a broker in his own name, is only one fact, and by no means a conclusive fact, from which, in the absence of other circumstances, it might be inferred that he was selling his own goods. Upon the facts proved or admitted in this case, the fact of selling in the broker's name was neither calculated to induce, nor did in fact induce that belief." Lord Watson said: "In order to sustain the defence pleaded by the appellants, it is not enough

to show that the agent sold in his own name. It must be shown that he sold the goods as his own, or in other words, that the circumstances attending the sale were calculated to induce, and did induce, in the mind of the purchaser a reasonable belief that the agent was selling on his own account, and not for an undisclosed principal; and it must also be shown that the agent was enabled to appear as the real contracting party by the conduct, or by the authority, express or implied, of the principal. The rule thus explained is intelligible and just; and I agree with Bowen, L. J., that it rests upon the doctrine of estoppel. It would be inconsistent with fair dealing, that a latent principal should, by his own act or omission, lead a purchaser to rely upon a right of set-off against the agent as the real seller, and should nevertheless be permitted to intervene and deprive the purchaser of that right at the very time when it had become necessary for his protection." *Cooke v. Eshelby*, 12 App. Cas. 271. In *Semenza v. Brinsley*, 18 C. B. N. s. 467, 477, it was held, that one who buys goods of a person whom he knows to be selling them as an agent, can not set off in an action by the principal for their price a debt due to him by the agent, even though he did not know at the time, of the purchase, and had not the means of knowing who was the real owner. The rule in *George v. Clagett*, 7 T. R. 359, is, that if a factor, who sells under a *del credere* commission, sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor against the demand for the goods made by the principal. But this rule is as above qualified by the rules laid down in such cases as *Cooke v. Eshelby*, 12 App. Cas. 271, and *Semenza v. Brinsley*, 18 C. B. N. s. 467, 477. Thus, in this latter case, Willes, J., referring to the rule in *George v. Clagett*, 7 T. R. 359, says: "In order to make a valid defence within the rule above stated, it is obvious that the plea should show that the contract was made by a person whom the plaintiff had intrusted with the possession of the goods; that that person sold them as his own goods, in his own name, as principal, with the authority of the plaintiff; that the defendant dealt with him as and believed him to be the principal in the transaction, and that before the defendant was undecieved in that respect, the set-off accrued." See *Fish v. Kempton*, 7 C. B. 687; *Borries v. Imperial Ottoman Bank*, L. R. 9 C. P. 38;

gave them the following contract note addressed to the plaintiffs: "We have this day sold for your account to our principal," so many tons of raisins. (Signed.) "M. & W., brokers." The defendants' principal having accepted part of the raisins, and not having accepted the rest, the plaintiffs brought an action on the contract against the defendants, and they sought to make the defendants personally liable by giving evidence that, in the London fruit trade, if the brokers did not give the names of their principals in the contract, they were held personally liable, although they contracted as brokers for a principal; and evidence was also given of a similar custom in the London Colonial Market. The Court of Queen's Bench held,¹ that the evidence of the custom in the same trade was admissible, as not inconsistent with the written contract; and that the evidence of a similar custom in the Colonial Market was admissible, being evidence in a similar trade in the same place, and as tending to corroborate the evidence as to the existence of such a custom in the fruit trade.²

Norwood v. Dresser, 14 C. B. N. s. 574; 17 C. B. N. s. 466; Carr v. Hinchcliff, 4 B. & C. 551; Pinchell v. Salter, 1 Q. B. 197; Sims v. Bond, 5 B. & Ad. 389; Baring v. Corvie, 2 B. & Ald. 137; Rabone v. Williams, 7 T. R. 360; Warner v. McKay, 1 M. & W. 591; Smart v. Sanders, 3 C. B. 399.

¹ Fleet v. Murton, L. R. 7 Q. B. 126.

² This case followed *Humphrey v. Dale*, 7 E. & B. 266; s. c. *nom.* *Dale v. Humphrey*, E. B. & E. 1004, where defendant, a broker, being employed by S. to purchase oil, signed a note as follows: "Sold this day for Messrs. T.," plaintiff's broker, "to our principals, ten tons of linseed oil," etc., "quarter per cent brokerage to" defendant. This note defendant delivered to Messrs. T. Defendant did not disclose the name of his principal, S., who became insolvent, and did not accept the oil. Plaintiff then sued defendant for not accepting the oil, laying the sale as by himself to defendant. Defendant denied the contract. On the trial plaintiff proved a custom in the trade that when a broker purchased without disclosing the name of his principal he was liable to be looked to as purchaser. It was held by the Court of Queen's Bench that evidence of the custom was admissible, as not contradicting the written instrument, but explaining its terms, or adding a tacitly implied incident; and that the action lay. The judgment was affirmed on appeal to the Exchequer Chamber, but by a bare majority of the judges, — four to three. The judgment of the dissenting judges was mainly based on the ground that the memoran-

dum of the contract was insufficient to satisfy the statute of frauds, the price of the oil being above £10. This position, however, is clearly untenable. The custom or usage is as much implied in the contract, as is the meaning of technical language descriptive of the goods sold, or connected with their quantity, quality, or price. The law on this point is well and accurately stated by Cockburn, C. J., thus: "I am of opinion that where, either by any rule of law or by the usage of any trade, the terms of a contract acquire a particular meaning, the contract must be taken to express that meaning as much as though it had been set forth *in extenso*; and I hold that this obtains as much for the purpose of satisfying the statute as for that of establishing the contract independently of the statute. That this is so, when the terms of a contract acquire a particular effect other than they would *primâ facie* import, by virtue of some rule of law, is, I think, too clear to admit of doubt or to require argument; nor, as it appears to me, is the difficulty greater where the particular signification is shown to attach to the terms of the contract by the usage of trade. For it must be remembered that the principle upon which evidence of such usage is admitted is that, as between those who are parties to the contract, and conversant with the terms used, those terms as clearly imply the particular meaning as though it had been set forth *in extenso*; and if this be so for the purpose of showing the effect and extent of the liability, it must be equally so for the purpose of satisfying the statute,

Agents selling goods, in which they themselves have an inter-

and to hold otherwise would lead to consequences altogether inconvenient and absurd; for it would follow that in no case in which a written contract was required by the statute of frauds could evidence of the usage of trade be admitted, — a doctrine never dreamed of in the numerous cases in which such evidence has been admitted. Now, according to the authorities cited on the argument, the legal effect of a contract entered into by a person as agent for an undisclosed principal is to bind the agent as principal, if the party with whom the contract is made thinks proper to sue him; besides which, in this case, independently of any rule of law, the like effect is given to the contract by the usage of the particular trade. The memorandum must therefore be read as though the defendants, while signing as agents for an unknown principal, had in terms declared that in the event of the vendor not discovering the principals, or preferring to hold them liable, they would be liable as principals, for this liability is tacitly included in the terms used; and I think, as I have before explained, that if this holds (as it undoubtedly does) for the purpose of ascertaining the liability of the defendants independently of the statute, it equally holds for the purpose of satisfying the statute. It may further be observed, that unless the foregoing conclusion were sound, in no case could an unnamed principal be sued on such a contract, or a party purporting to sign as agent, but being in fact the principal; nor, on the other hand, could an unnamed principal take advantage of such a contract; yet the contrary is well established by authority and precedent." *Dale v. Humphrey*, E. B. & E. at p. 1021. It is noteworthy that although in this case three of the seven judges held *contra*, mainly resting on the statute of frauds, yet in *Fleet v. Morton*, L. R. 7 Q. B. 126, where *Dale v. Humphrey* was followed and approved, no question was even raised on any ground as to the correctness of the decision, by either court or counsel. See *Higgins v. Senior*, 8 M. & W. 834; *Jones v. Little-dale*, 6 A. & E. 486; *Magee v. Atkinson*, 2 M. & W. 440; *Sowerby v. Butcher*, 2 C. & M. 371; *Wilson v. Hart*, 7 Taunt. 295; *Spittle v. Lavender*, 2 Bro. & B. 452; *Garrett v. Handley*, 4 B. & C. 664; *Bateman v. Phillips*, 15 East, 272; *Seaber v. Hawkes*, 5 M. & P. 549; *Paterson v. Gandasequi*, 15 East, 62; *Le Fevre v. Lloyd*, 5 Taunt. 749; *Hill v. Perrott*, 3 Taunt. 274; *Sharp v. Emmett*, 5 Whart. 288; *Calder v. Dobell*, L. R. 6 C. P. 486; *Couturier v. Hastie*, 8 Ex. 40, 56; *Moore v. Campbell*, 10 Ex. 323; *Pennell v. Alexander*, 3 E. & B.

283; *Schmaltz v. Avery*, 16 Q. B. 655; *Hutton v. Warren*, 1 M. & W. 466; *Carr v. Jackson*, 7 Ex. 382; *Thompson v. Dav-enport*, 9 B. & C. 78; *Bywater v. Richardson*, 1 A. & E. 508; *Brown v. Byrne*, 3 E. & B. 703; *The Reeside*, 2 Sumn. 569; *Winthrop v. Union Ins. Co.*, 2 Wash. C. C. 7; *Gordon v. Little*, 8 S. & R. 533; *Snowden v. Warden*, 3 Rawle, 101; *Thompson v. Hamilton*, 12 Pick. 425; *Astor v. Union Ins. Co.*, 7 Cow. 202; *Cooper v. Kane*, 19 Wend. 386; *Shaw v. Mitchell*, 2 Mete. 65; *Leach v. Beardslee*, 22 Conn. 404; *Loring v. Gurney*, 5 Pick. 15. We find the view we have expressed above as to the competency of parties to give evidence of a usage to explain a contract, as they may give evidence of the meaning of technical language used in a written contract, is also taken by Story, J., in *The Reeside*, 2 Sumn. 567, 569, where he says: "The true and appropriate office of a usage or custom is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But I apprehend that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, *à fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede or vary or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled or varied or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary, or contradict written contracts, but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate written declarations of the parties." It was accordingly held in that case that the condition in a bill of lading that goods should be delivered in good order and condition, the danger of the seas only excepted, could not be controlled by a usage exempting the vessel from a liability for damage to the goods not caused by the dangers of the seas. The language uttered by Story, J., as above, over fifty

est, and selling in their own names, but for their principals, can maintain an action in their own names for the price.¹

years ago will cover the various well-decided cases down to the present time, including the many nicely decided English cases on the points involved, to be met with in the latest reports. See also *Hare v. The Mutual Safety Ins. Co.*, 1 Sandf. 137, 150, where Sandford, J., takes, as we have done, the rule as to the allowance of evidence to explain technical language in a written contract as illustrative of the right to give evidence of usage to explain the meaning of the contract. At *Ibid.* p. 152, he says: "In fine, we believe that the rule of construction applicable to policies of insurance does not differ from that applied to other mercantile instruments. Its sense and meaning are to be ascertained from the terms of the policy, taken in their plain and ordinary signification, unless such terms have by the known usage of trade in respect to the subject-matter acquired a meaning distinct from the popular sense of the same terms, or unless the instrument itself, taken together, shows that they were understood in some peculiar manner. And that while we may not enlarge or restrict the clear and explicit language of the contract by proof of a custom or usage, yet in the application of the contract to its subject-matter in bringing it to bear upon any particular object, the customs and usages of trade are admissible to ascertain what subjects were within and what were excluded from its operation. Such evidence is proper, on the same principle that proof of the meaning of technical words and words of science and the arts is permitted in arriving at the intention of the parties in the construction of contracts." Proof of a general usage, the effect of which is to control rules of law, is inadmissible. *Edie v. East India Co.*, 2 Burr. 1216; *Frith v. Birker*, 2 Johns. 327; *Horner v. Dow*, 10 Mass. 26; *Runkin v. The American Ins. Co.*, 1 Hall (N. Y.), 619; *Turner v. Burrows*, 5 Wend. 541; 8 Wend. 144. And see *Wadsworth v. The Pacific Ins. Co.*, 4 Wend. 33; *Dow v. Whetten*, 8 Wend. 160; *Maey v. The Whaling Ins. Co.*, 9 Mete. 354; *Coit v. The Commercial Ins. Co.*, 7 Johns. 385; *Astor v. The Union Ins. Co.*, 6 Cow. 202. That usages of banks and other public institutions, and sometimes of individuals, may legally be proved is well settled. *Morgan v. Richards*, 1 Browne (Pa.), 171. And where such usages are known to the parties, business is transacted with reference to them, and they enter into and form a part of the contract. All persons accustomed to transact business at banks and other public

offices are presumed to know and assent to their usages. But the usages of individuals cannot affect their contracts, unless it appear that the usage was known to the persons with whom they contracted. The usage is an independent fact, which, if proved, cannot avail the party relying on it, unless he brings a knowledge of it home to the other contracting party. *Loring v. Gurney*, 5 Pick. 15.

¹ *McCullough v. Roots*, 19 How. 349. See *Bott v. McCoy*, 20 Ala. 578; *Walcott v. Keith*, 2 Foster (N. H.), 196. An agent who insures for another with his authority may sue for the sum assured in his own name. *The Provincial Ins. Co. v. Leduc*, L. R. 6 P. C. 224.

L., an agent of B., insured some goods belonging to B., that were being sent by ship from Montreal to St. John's, Newfoundland. The insurance company's agent issued to L. a "certificate of insurance," which stated that L. had insured the goods. It was the custom of the company to issue subsequently a policy stating that "A. B., as well in his own name as in the name of every person to whom the same shall appertain," had made insurance, and caused to be insured, &c. On a loss occurring, B. brought an action against the insurance company in the Superior Court of Lower Canada, when judgment was given for the defendants, which was affirmed by the Court of Queen's Bench for Lower Canada. On appeal to the Privy Council, the Judicial Committee held, that, by the law of England, speaking generally, as well as by the law of Lower Canada, an undisclosed principal may sue and be sued upon mercantile contracts made by his agent in his own name, subject to any defences or equities which, without notice, may exist against the defendant. On the application of that principle to this case, they say: "There seems no sufficient ground for making a distinction in the case of marine policies of insurance, especially when, having regard to the ordinary course of business, it must be known that they are commonly made by agents. If, indeed, any particular interest were described in the policy to belong to the person named in it, an objection might arise founded on the rule that written contracts cannot be contradicted by parol evidence. This objection, however, does not occur in this case, where the insurance is general on the goods, and no interest is expressly described. But if this were not the law in the case of a policy which did not contain the usual clause 'as well in

The defendants, acting as agents for one L., chartered a ship for the conveyance of a cargo of currants from the Ionian Islands. The charter-party was expressed to be made, and was signed, by the defendants, as "agents to merchants," the name of the principal not being disclosed. It was proved that the defendants, in making the charter-party, had acted as agents for one Lyons, with due authority to do so; but evidence was tendered on the part of the plaintiffs, and admitted, of a trade usage, that if the principal's name was not disclosed within a reasonable time after the signing of the charter-party, in such case the broker would be personally liable. The jury found that such a custom existed, and that the name of the principal had not, in this case, been disclosed within a reasonable time. The verdict was entered for the plaintiffs, with leave reserved to defendants to move to enter the verdict for themselves, on the ground that they had contracted as agents, and that parol evidence was inadmissible. It was conceded that on authority,¹ and according to the general understanding in mercantile matters of the effect of a contract so framed, apart from custom, the defendants were not responsible. The court held, on the authority of those cases and others,² that evidence of the custom was admissible.³

his own name, &c., it is not denied that it would be so in the case of one which does; and their lordships think that in this case the certificate ought to be construed with reference to the proved usage of the respondents to treat such a document as provisional, entitling the assured to a policy in their common form, which would contain the above clause. This common form of the respondents' policy clearly shows that in their contemplation the person named in the certificate might be contracting as an agent for another; and, therefore, as against them, the contract ought to be interpreted as if the above clause were contained in it." And the appeal from the judgment of the Canadian courts was accordingly sustained, and their judgment reversed. *Browning v. The Provincial Insurance Co. of Canada*, L. R. 5 P. C. 263. See *Sims v. Bond*, 5 B. & Ad. 389; *Higgins v. Senior*, 8 M. & W. 834; *Humble v. Hunter*, 12 Q. B. 310; *Ramazotti v. Bowring*, 7 C. B. N. S. 851; *De Vignier v. Swanson*, 1 B. & P. 396, n.; *Watson v. Swann*, 11 C. B. N. S. 756; *Calder v. Dobell*, L. R. 6 C. P. 486.

¹ *Fleet v. Murton*, L. R. 7 Q. B. 126; *Fairlie v. Fenton*, L. R. 5 Ex. 169.

² *Humphrey v. Dale*, 7 E. & B. 266; *E. B. & E. 1004*; *Deslandes v. Gregory*, 2 E. & E. 602, 607.

³ The limit on the admissibility of such

evidence is thus put by Brett, J.: "It is not easy to define exactly limits within which evidence of mercantile custom is admissible to vary the meaning of a written contract. It is clear that evidence is not admissible to contradict the writing; but in one sense the contract must always be varied by the admission of the evidence of custom, inasmuch as the effects of the contract would not be the same without the parol evidence, or else the parol evidence would itself be unnecessary. The evidence of custom that is inadmissible must be, it appears to me, evidence of something inconsistent and irreconcilable with the written contract. The evidence here proposed to be given can only be inadmissible if the import of the words 'as agents' is such as to exclude a collateral provision for liability as principals in a certain contingency. It is not attempted to show that the defendant's principals would not, *prima facie*, and, in most cases, be liable as the principals, and not the defendants; but that, in a certain particular contingency, the defendants might themselves be personally liable. This does not seem to me so inconsistent and irreconcilable with the contract as to amount to a contradiction or variation beyond what is admissible." *Hutchinson v. Tatham*, L. R. 8 C. P. 482. See *ante*, note 2 to p. 526.

In *Deslandes v. Gregory*, 2 E. & E. 602,

The case of *Hough v. Manzanos*¹ is, outside of the question of usage or custom, a case very similar to *Hutchinson v. Tatham*.² In *Hough v. Manzanos*, a charter-party was entered into between plaintiffs, ship-owners, and defendants, "as agents for charterers." It was signed by the defendants without any qualification, but contained a clause that the ship was to load "from the agents of the said freighters," and a cesser clause that, the charter being entered into on behalf of others, all liability of charterers should cease on completion of loading and payment of advance. In an action for breach of the charter-party, the defendants, by their statement of defence, denied their personal liability. It was held by Pollock, B., that the defendants were liable on the charter-party. Although Pollock, B., so decides, he is, obviously, not satisfied with his own judgment. He had himself, previously, in *Gadd v. Houghton*,³ held that the defendants were not liable where they purported to contract "on account of" another; but felt himself bound by the decision in *Paice v. Walker*,⁴ on the ground that that case had held, when the defendants used the words "as agents for" another, they were liable. He failed to appreciate the distinction between the two terms, but, notwithstanding, felt himself bound by what he conceived was the holding in *Paice v. Walker*. We have already pointed out, what we think is clear, that the decision in *Paice v. Walker*, as distinguishing it from *Gadd v. Houghton*,⁵ can only be sustained, because, in the words of James, L. J., in *Gadd v. Houghton* :⁶ "The

a charter-party, made in London, between plaintiff, ship-owner, and defendants, "as agents to Samuel Ferguson, of Anamaboe, merchants and charterers," was signed "for D. [plaintiff] owner, H. C. as agent. For Samuel Ferguson, Esq., of Anamaboe, G. Brothers [defendants] as agents." The charter-party was partly written and partly printed, the words "merchants" and "charterers" being printed, and in the plural throughout it. Defendants, merchants in London, acted in England as agents for Ferguson, a native of Africa, and residing at Anamaboe in that country. By the charter-party, plaintiff's ship was chartered for a voyage from London to Africa and back, and freight was made payable on delivery of the return cargo. It was held by the court of Queen's Bench, affirmed by the Exchequer Chamber, that the defendants were not personally liable, as principals, on the charter-party. Williams, J., in delivering the judgment, said : "The form of the charter-party, and the mode of signature, taken together, are decisive to show that the defendants did not bind themselves by the contract as principals. They sign 'For Samuel Ferguson,

Esq., of Anamaboe, Gregory Brothers, as agents.' It would require extremely plain words in the body of the contract to control the effect of that mode of signature, and no such words are to be found there, the contract purporting to be made by 'Messrs. Gregory Brothers, as agents to Samuel Ferguson, of Anamaboe, merchants and charterers.' The only argument that can be relied upon by the appellant is that the words 'merchants' and 'charterers' are in the plural; but this evidently happened by mistake, and the words occur, moreover, in the printed part of the charter-party." *Deslandes v. Gregory*, 2 E. & E. 610. See *Tanner v. Christian*, 4 E. & B. 591; *Leonard v. Robinson*, 5 E. & B. 125; *Parker v. Winlow*, 7 E. & B. 942; *Green v. Kopke*, 18 C. B. 549; *Leadbitter v. Farrow*, 5 M. & S. 345, 349, *per* Lord Ellenborough, on the same question.

¹ 4 Ex. Div. 104.

² L. R. 8 C. P. 482.

³ 1 Ex. Div. 357.

⁴ L. R. 5 Ex. 173.

⁵ 1 Ex. Div. 357.

⁶ 1 Ex. Div. at p. 359.

ratio decidendi in *Paice v. Walker* was that, having regard to the contract and all the circumstances of the case, the words 'as agents' must be considered as merely describing or intimating the fact that the defendants were agents, and did not amount to a statement that they were making a bargain 'on account of' another person." We think, therefore, as far as *Hough v. Manzanos*¹ rests upon *Pollock, B.'s*, view of *Paice v. Walker*² being a binding authority upon him to hold as he did in *Hough v. Manzanos* — and he expressly puts it upon that ground — that this latter case is of very little value as an authority. It is quite clear that though one is a broker or agent for another, it is quite competent for him so to frame a contract as to bind himself as a principal to the contract. Whether he does so or not is a question of construction of the contract in the light of the surrounding circumstances.

In *Christoffersen v. Hansen*,³ by a charter-party between plaintiff and defendant, it was agreed that plaintiff's ship should, with all convenient speed, proceed to S., and that defendant should there load the ship in regular turn with a full cargo of coals, and the ship should proceed with it to K., and deliver to freighter or assigns, on payment of certain freight; "and that, the charter being concluded by defendant on behalf of another party resident abroad, *all liability of defendant should cease* as soon as he had shipped the said cargo." Under this form of charter-party, in which the liability of the defendant down to the time of shipping the cargo was implied, it was held that the defendant was exempted only from liability accruing after the loading of the cargo, and that he remained liable for delay in loading, although he had ultimately loaded a full cargo. This case seems to differ from the case of *Hough v. Manzanos*,⁴ in that, in this case, the "charterer" was the defendant, whose liability on the charter-party was to cease at a certain time; whereas, in *Hough v. Manzanos*,⁵ the defendant chartered the ship "as agents for charterers," and the cesser clause provided that the "liability of charterers" should cease on completion of loading and payment of advance. So that the decision in *Christoffersen v. Hansen*⁶ might well be sustained as a sound construction of the contract, and *Hough v. Manzanos*,⁷ under the different language of the charter-party, being decided, as simply following the decision in *Paice v. Walker*,⁸ under the entirely different facts and circumstances of that case, be not good law.

¹ 4 Ex. Div. 104.

² L. R. 5 Ex. 173.

³ L. R. 7 Q. B. 509.

⁴ 4 Ex. Div. 104.

⁵ 4 Ex. Div. 104.

⁶ L. R. 7 Q. B. 509.

⁷ 4 Ex. Div. 104.

⁸ L. R. 5 Ex. 173.

In all these cases, reliance is placed on the rule laid down in Smith's Leading Cases; ¹ thus: "It may be laid down as a general rule that where a person signs a contract in his own name without qualification, he is *primâ facie* to be deemed to be a person contracting personally, and in order to prevent this liability from attaching, it must be apparent from the other portions of the document, that he did not intend to bind himself as a principal." ²

We are of opinion that this much-quoted rule is, like many other general rules for construction of contracts, of very little value. We quote the words from Smith's Leading Cases, preceding his statement of this "general rule," as more correctly embodying our views. He says: "In all these cases, the question whether the person actually signing the contract is to be deemed to be contracting personally, or as agent only, depends upon the intention of the parties as discoverable from the contract itself." ³ And, we submit, this question is to be settled by the language in the entire contract — body and signature. Mellish, L. J., in dealing with the rule which we have quoted, says: "I can see no difference between a man writing 'I, A. B., as agent for C. D., have sold to you,' and signing 'A. B.,' and his writing 'I have sold to you,' and signing 'A. B., for C. D., the seller.' When the signature comes at the end, you apply it to everything which occurs throughout the contract. If all that appears is that the agent has been making a contract on behalf of some other person, it seems to me to follow of necessity that that other person is the person liable." ⁴ And, notwithstanding the stress Smith laid on the signature, — which part of his rule is usually quoted without the language preceding it, quoted by us, — he says: "The fact that the signature is expressed to be made 'as agent,' is strong to show that the person signing does not mean to bind himself per-

¹ Vol. ii. 386, 7th ed.

² This, in effect, is the statement of Lord Ellenborough, in *Leadbitter v. Farrow*, 5 M. & S. 345, 349, where he says: "Is it not an universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it *for* another, or by procuration of another, which are words of exclusion? Unless he says plainly, 'I am the mere scribe,' he becomes liable." In this case, the agent of a bank drew a bill in his own name, with nothing in the body of the bill, or in connection with his signature, to qualify his liability as drawer, and, on the dishonor of the bill, he was necessarily held liable as drawer. See *Thomas v. Bishop*, Str. 955; *Appleton v. Binks*, 5 East, 148; *Le Fevre v. Loyd*, 5 Taunt.

749. On the same principle as governed these cases, in *Kaimes v. Knightly, Skinn.* 54, upon a policy of assurance from Archangel to Leghorn, where the defendant sought to show by parol, that the risk was to commence only from the Downs, it was said by Pemberton, C. J., "That policies were sacred things, and that a merchant should no more be allowed to go from what he had subscribed in them, than he who subscribes a bill of exchange, payable at such a day, shall be allowed to go from it, and say it was agreed to be upon a condition, etc., for though neither of them are specialties, yet they are of great credit, and much for the support, convenience, and advantage of trade."

³ 2 Sm. Lead. Cas. 400; 8th ed.

⁴ *Gadd v. Houghton*, 1 Ex. Div. 360.

sonally, *if the terms of the contract itself do not show a contrary intention.*"¹ And the converse of this is equally true, that the fact that the signature is *not* expressed to be made "as agent" is strong to show that the person signing does mean to bind himself personally, *if the terms of the contract itself do not show a contrary intention.* And this, in effect, is exactly what Smith states in the rule we have previously quoted; but, in some of the cases, while great stress is laid upon the signature being in the party's own name, no force whatever is allowed the rest of the rule, which overcomes the effect of the signature when it is "apparent from the other portions of the document that he did not intend to bind himself as principal."

After all, whether the signature be nominally that of agent or not, the question whether the person actually signing the contract is to be deemed to be contracting personally or not, "depends upon the intention of the parties as discoverable from the contract itself." As Bigelow, C. J., on another question of construction of a contract, so well says: "It is a question of intent, arising on the interpretation of the entire contract in each case."²

*Lennard v. Robinson*³ is the case which was relied on in *Paice v. Walker*,⁴ for the holding in the Court of Exchequer, that the words in the contract, "Sold P., London, . . . *as agents for J. S. & Co. of Danzig*," did not relieve the defendants from liability as principals to the contract; these words being held to be words of description only. We have already referred to the fact that, outside of this holding, the case of *Paice v. Walker* may be sustained on the grounds stated in *Gadd v. Houghton*.⁵ It is clear if it is not sustainable on that ground, it is not so on the express ground on which it was decided. But, on this ground, it is clearly opposed by what we think is the much better holding in *Gadd v. Houghton*. We have already intimated our opinion of the view of Pollock, B., in *Hough v. Manzanos*,⁶ of the *ratio decidendi* of *Paice v. Walker*,⁷ and that, in the light of the decision of *Gadd v. Houghton*, the holding in *Hough v. Manzanos* cannot be sustained.

The case of *Lennard v. Robinson*,⁸ on which *Paice v. Walker* was ostensibly decided, is very similar to *Hough v. Manzanos*.⁹ The latter case, though, as we have seen, was decided on what, it is clear, was the misapprehension of Pollock, B., as to the stress laid by James, L. J., on the distinction between the words "as agents for," in *Paice v. Walker*, and "on account of," in *Gadd v.*

¹ 2 Sm. Lead. Cas. 399.

² *Briggs v. A Light-Boat*, 89 Mass. 287.

³ 5 El. & B. 125.

⁴ L. R. 5 Ex. 173, 176.

⁵ 1 Ex. Div. 357.

⁶ 4 Ex. Div. 104.

⁷ L. R. 5 Ex. 173.

⁸ 5 El. & B. 125.

⁹ 4 Ex. Div. 104.

Houghton; from which he concluded, as the words "as agents for" are also in *Hough v. Manzanos*, that he was bound, evidently against his own opinion, apart from the effect upon it of his view of the holding in *Paice v. Walker*, to follow the holding in this latter case. The distinction between "as agents for" and "on account of" is, in the connection in which these words are used, so extremely nice as to be scarcely distinguishable, and if *Gadd v. Houghton* is correctly decided, as we think it is, then, obviously, we think *Hough v. Manzanos* is not. And yet we think the distinction between the facts in *Gadd v. Houghton*, in *Hough v. Manzanos*, and in some of the cases in which a decision adverse to the holding in *Gadd v. Houghton* has been reached, is so extremely thin as to be inappreciable, and that if *Gadd v. Houghton* is sound law, there are other cases which have been differently decided, which are not so. Of course all these questions arise out of cases where the language is not as clear as it might be. In all of these cases, the same rule is either directly or qualifiedly acted on, namely, that where a person signs a contract in his own name *without qualification*, he is *prima facie* to be deemed to be a person contracting personally, and in order to prevent this liability from attaching, it must be apparent from the other portions of the document that he did not intend to bind himself as principal. We are very much of the opinion of James, L. J., in *Gadd v. Houghton*, that the rule is badly expressed, and that, whether the language be, "I, A. B., as agent for C. D., have sold to you," and signing "A. B.," or "I have sold to you," and signing "A. B., for C. D., the seller," the legal effect is the same. The rule better expressed is simply the old common-law rule, applicable to written contracts: In construing the contract the whole language of the contract must be taken into consideration. We venture to say, if this sounder way of stating the rule had been acted on, rather than attempting to act on the other badly stated rule, some of the other decisions would have been nearer that of *Gadd v. Houghton* than they are.

Thus, in *Cooke v. Wilson*,¹ where the language was quite as strong as in *Gadd v. Houghton*, — "on behalf of," which is clearly quite as plain as "on account of," to show a contract for a principal, — it was held, because the agent signed his name, without adding "as agent," that he was the principal to the contract. We think that, quite plainly, had the sound rule of law, that in construing the contract the whole language of the contract is to be looked to, been applied to this case, the decision would not have been contrary to, but in harmony with the more recently,

¹ 1 C. B. N. s. 153.

and, we think, the better decided case of *Gadd v. Houghton*. Looking, in *Cooke v. Wilson*, at "the other portions of the contract," it is quite "apparent" that the contract was made "on account of" or "on behalf of" a principal; language clearly quite as strong and conclusive in the body of the contract as though to the signature had been added the no stronger (or, as Pollock, B., in *Hough v. Manzanos*, deemed that *Gadd v. Houghton* and *Paice v. Walker*, in conjunction, had decided them to be, the weaker) words, "as agent for."¹

In fact, in *Lennard v. Robinson*,² the signature to a charter-party was expressly, "by authority of, and as agents for S. of Memel, R. & F.," and yet it was held that the defendants were liable; the terms of the contract showing that they contracted personally. In this case the charter-party was made between the plaintiff and "R. & F. of London, merchants," for a cargo of salt, "which the said merchants (*i. e.* R. & F.) bind themselves to ship." They were held liable on their express contract. On the other hand, in *Oglesby v. Yglesias*,³ the signature was simply that of the defendant, but, in the body of the charter-party, he was described "as agent for the freighter," with an express disclaimer of liability by the signer, as the "charter was concluded for another party," and it was held that he was not liable. These cases were decided with undoubted correctness on a proper construction of all the language in the contracts.⁴

¹ See also *Downman v. Williams* (7 Q. B. 103), where the Exchequer Chamber, reversing the decision of the Court of Queen's Bench (*Jones v. Downman*, 4 Q. B. 235), held, on the very language used in *Cooke v. Wilson* (1 C. B. N. S. 153), "on behalf of," that the party signing his own name, without any such affix, as agent, was not liable as a principal. See also, *Lucas v. Beale*, 10 C. B. 739. The following, in the American note to *Lennard v. Robinson*, 5 El. & B. 125, 131, is well laid down: It is not sufficient, to charge the principal or protect the agent from personal responsibility, merely to describe himself as agent, if the language of the instrument imports a personal contract on his part. But where the name of the principal appears on the face of the instrument or contract, and it is evident that the agent did not intend to bind himself, personally, but acted merely on behalf of the principal, if he acted by competent authority, the principal and not the agent will be bound. *Pente v. Stanton*, 10 Wend. 271. See *Hopkins v. Mehaffy*, 11 Ser. & R. 129; *Kirkpatrick v. Stainer*, 22 Wend. 244; *Tainter v. Prendergast*, 3 Hill, 72; *Symonds v. Heard*, 22 Pick. 121.

² 3 El. & B. 125.

³ E. B. & E. 930.

⁴ See, to the same effect, *Pederson v. Lotinga*, 28 L. T. 267, where the agent, signing in his own name, without any affix, but describing himself in the charter-party, was held liable only as far as he contracted in the charter-party to become so. But in an action on a written agreement, purporting on the face of it to be made by the defendant, and subscribed by him, for the sale and delivery by him of goods, it is not competent for the defendant to discharge himself on an issue on the plea of non-assumpsit, by proving that the agreement was really made by him by the authority of, and as agent for, a third person, and that the plaintiff knew these facts at the time the agreement was made and signed; as that would violate the rule against allowing parol evidence to contradict the written agreement. *Higgins v. Senior*, 8 M. & W. 834. Such evidence may be given to charge the principal, but not to discharge a party from liability on a written contract, on the face of which he appears to be liable. See *Jones v. Littledale*, 6 A. & E. 486; *Magee v. Atkinson*, 2 M. & W. 440; *Sowerby v. Butcher*, 2 Cr. & M. 371;

The defendant, a broker, and known by the plaintiffs to be such, signed and sent to the plaintiffs a note of a contract in the following terms: "I have this day sold by your order, and for your account, to my principals, about five tons of pressed anthracene. . . . W. A. Bowditch." The defendant sent to the purchasers, Messrs. Bloth & Co., a bought note corresponding to the sold note sent to the plaintiffs. The defendant disclosed to the plaintiffs the name of the purchasers before the prompt day. An attempt was made at the trial to prove usage making the defendant personally liable, but failed. The note showed that the sale was made subject to "one per cent. brokerage." It was claimed for the plaintiffs that the defendant was personally liable as a principal for the price of the goods delivered under the contract. It was contended for the defendant that the note did not import personal liability on the defendant's part. The Common Pleas Division held that the defendant was liable; principally on the ground that he had signed a "contract in his own name without any qualification," and that therefore, "even although in the body of the document there may be some expressions tending to show that he is acting for another, he must, nevertheless, be taken to have intended to bind himself as principal."¹ This manifestly incorrect decision came before

Garrett v. Handley, 4 B. & C. 664; *Bateman v. Phillips*, 15 East, 272; *Paterson v. Gandasequi*, 15 East, 62; *Le Fevre v. Lloyd*, 5 Taunt. 749; *Pentz v. Stanton*, 10 Wend. 277; *Stackpole v. Arnold*, 11 Mass. 27; *Sharp v. Emmett*, 5 Whart. 283. In a case to which we have previously referred (*Bray v. Kettell*, 1 Allen, 80), it was held that an agent is not personally responsible on contracts entered into by him, if it appears that in point of fact exclusive credit was given to his principal; and if the contract is in writing, and clear and unambiguous in its terms, the intention of the parties must be gathered from it alone, without resorting to other facts and circumstances to vary its construction and legal effect. So, in *Green v. Kopke* (18 C. B. 549), it was held, where a contract in writing for the sale of goods is entered into by one who describes himself as agent, and as making the contract "as agent, and on behalf of" his principal, naming him; that the party so making the contract is not personally liable. In each case it is a question of intention, to be gathered from the contract. See further, *Wilson v. Zulueta*, 14 Q. B. 405; *Delricks v. Ford*, 23 How. 49; *Ex parte Hartop*, 12 Ves. 349; *Davis v. McArthur*, 4 Greenl. 82, note; *In re Rebecca*, 313, 205; *Roberts v. Austin*, 5 Whart. 318; *Owen v. Gooch*, 2 Esp. 567;

Thomas v. Bishop, 2 Stra. 955; *Leadbitter v. Farrow*, 5 Mau. & S. 345; *Dusenbury v. Ellis*, 3 Johns. 50; *Stackpole v. Arnold*, 11 Mass. 29; *Hastings v. Lowring*, 2 Pick. 221; *Hampton v. Speckenagle*, 9 Ser. & R. 212; *Short v. Skipwith*, 1 Brocken. 103; *Rathbone v. Budlong*, 15 Johns. 1; *Goodenow v. Tyler*, 7 Mass. 36; *Greely v. Bartlett*, 1 Greenl. 172; *Corlies v. Cumming*, 6 Cow. 181; *Zacharie v. Nash*, 13 La. 20; *Mills v. Hunt*, 20 Wend. 431; *Newhall v. Dunlop*, 14 Me. 180; *Mauri v. Heffernan*, 13 Johns. 58; *Seaber v. Hawkes*, 5 M. & P. 549; *Hall v. Huntoon*, 17 Vt. 244; *Chase v. Debolt*, 2 Gilm. 371; *Hunter v. Miller*, 6 B. Mon. 612; *Andrews v. Allen*, 4 Harring. 452; *Rogers v. March*, 33 Me. 106; *Johnson v. Smith*, 21 Conn. 627.

¹ *Per* Lord Coleridge, C. J., at p. 101 *et seq.*, *Southwell v. Bowditch*, 1 C. P. D. 100. The fallacy of Coleridge, C. J., is well shown where he says: "The current of decisions is too strong . . . to contest the proposition that when a man signs a contract in his own name without any qualification, even although in the body of the document there may be some expressions tending to show that he is acting for another, he must nevertheless be taken to have intended to bind himself as a principal." This, in that case, is quite as bad as the statement by Smith, in his

the Court of Appeal, on appeal,¹ when the decision of the court below was reversed. Jessel, M. R., puts the principle involved clearly. He says: "This is an appeal from a decision of the Common Pleas Division, interpreting a mercantile contract. The first observation which I wish to make is that, so far as I know, there is in law no difference of construction between mercantile contracts and other instruments. The grammatical meaning is, as in other cases, the meaning to be adopted unless there be reason to the contrary. In the present case there can be no doubt that the person signing this contract intended to sign as broker. The contract says, 'sold by your order, and for your account,' and 'to my principals.' There is nothing whatever on the contract to show that the defendant intended to act otherwise than as broker. No doubt it does not absolutely follow from the defendant's appearing on the contract to be broker, that he is not liable as principal. There are two ways in which he might so be made liable. *First*, intention on the face of the contract making the agent liable as well as the principal. *Secondly*, usage. But, as to usage, none was proved; and I can see nothing on the face of this contract to make the agent liable as well as the principal. There is no more vicious line of argument, if I may say so with deference to the court below, than that which was adopted by the court below in this case, of comparing one contract with another, and saying it

Leading Cases (Vol. ii. 400, 8th ed.), which, disconnected from its context, has proved misleading, that "it may be laid down as a general rule, that where a person signs a contract in his own name, without qualification [*i. e.* in connection with his signature], he is *prima facie* to be deemed a person contracting personally." As was well held in *Southwell v. Bowditch*, 1 C. P. Div. 374, by the Court of Appeal, courts are bound to construe mercantile contracts, not less than other contracts, by the words used, and by the whole of the words used, body as well as signature, and according to the natural and usual meaning of those words. Under this undoubtedly correct principle, what was there, in this case, to show, where the memorandum or note of the contract expressly declared, "I have this day sold by your order and for your account to my principals," that that constituted a purchase for himself, by the party signing such a memorandum, simply because he signed it with his own name, "without any qualification"? What "qualification" could possibly be required, when, in the instrument, signed by himself, he expressly declares, that he had sold by their order and for their account to his

principals? who, in fact, were a firm of Bloth & Co. The incorrect application of a grossly misleading rule, upon which we have previously animadverted, is well illustrated by the holding of the Common Pleas Division in *Southwell v. Bowditch*, 1 C. P. Div. 100. There is a rather absurdity in that case which was not referred to by the Court of Appeal in reversing the judgment, namely, that the defendant was the agent of the sellers in making the sale, in pretending, as he certainly claims to have done, to have sold to others; if he had been himself the purchaser, he was acting both as seller and purchaser, and was committing a fraud. If, under such a contract, he had been actually the purchaser, and the action had been to set aside the sale on the ground of his having been, as the agent of the sellers, the fraudulent purchaser, there can be no question as to what, in that case, the construction of the written contract would have been. For that, or for any other purpose, the contract clearly is open to but one construction, namely, that which was placed upon it by the Court of Appeal, in overruling the utterly untenable decision of the court below.

¹ *Southwell v. Bowditch*, 1 C. P. D. 374.

differs very little; you arrive ultimately at identifying wholly different contracts." A distinction was admitted¹ between the cases where the broker uses the language, "sold for you to my principals," as in this case, and "bought of you for my principals;" in the latter case, the broker being himself liable where the principal was undisclosed, but not in the former, as it shows that he was the agent of the seller himself.

To an action for damages for not accepting goods "to arrive," the defendant pleaded, by way of equitable defence, that the contract was made with one H., who was the agent of and intrusted by the plaintiff with the possession, etc., of the goods as apparent owner thereof; that H., with the consent of the plaintiff, contracted in his own name, and that the defendant believed him to be the owner, and did not know that the plaintiff was the owner of or interested in the goods, or that H. was an agent; that H. was afterwards adjudicated a bankrupt; that, before the bankruptcy, mutual credit had been given by the defendant and H. in respect of the sale of the goods under the contract, and in respect of money payable by H. to the defendant upon accounts stated, etc., before the bankruptcy and before the defendant had notice that H. was acting as agent; claiming a set-off. There was a second count in the declaration (which would have raised a very different question) for goods bargained and sold; but this count was withdrawn. The declaration remained, therefore, with but the count for refusing to accept and pay for the cotton. To such a count, the Court of Common Pleas held² the plea to be bad; the action being for unliquidated damages, and the set-off not within the rule in *George v. Clagett*.³ Had the defendant accepted the goods, and the action been for the price, or had the expunged count been re-

¹ *Per Mellish, L. J.*, at p. 379.

² *Turner v. Thomas*, L. R. 6 C. P. 610.

A usage in the wool trade in Liverpool, that, when a broker is employed to buy wool, he may either contract in the name of his principal, or, at the request of the seller, may, without communicating the fact to his principal, make himself personally responsible for the price, was held a good and reasonable usage. *Cropper v. Cook*, L. R. 3 C. P. 194. And, therefore, a set-off between the purchasers and broker was allowed. *Ib.* In England, by the usage of the Stock Exchange, where buyer and seller may or may not both be acting for a principal, though no principal is named, yet it is held that, notwithstanding that as between members of the Stock Exchange among themselves all are principals, the

parties on whose behalf the contract is made may sue each other upon it. *Taylor v. Stray*, 2 C. B. N. s. 175; s. c. in error, *Ib.* 197. A person who employs a broker on the Stock Exchange impliedly gives him authority to act in accordance with the rules there established, though such principal may himself be ignorant of the rules. *Pollock v. Stables*, 12 Q. B. 765. See *Lamert v. Heath*, 15 M. & W. 486; *Bosanquet v. Shortridge*, 4 Ex. 699; *Westropp v. Solomon*, 8 C. B. 345.

³ 7 T. R. 359. The holding in *George v. Clagett* is that if a factor who sells under a *del credere* commission, sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor against the demand for the goods made by the principal.

tained, the principle in *George v. Clagett* would have applied, and the set-off would have been allowed.¹

C., a broker, was authorized by the defendant to buy cotton for him, but not to disclose his name. C.'s credit not being good enough to enable him to obtain a contract upon his own sole responsibility, he gave the plaintiffs the name of his principal, and bought and sold notes were exchanged between the plaintiffs and C., in which the latter was named as the buyer. C. sent the defendant an advice-note, informing him that he had bought the cotton of the plaintiffs "for him," and the defendant did not repudiate the transaction. An invoice was made out to C., and, the market falling, C. was called upon to accept and pay for the cotton, and threatened with legal proceedings. Failing to obtain payment from C., the plaintiffs sued the defendant. Held, by the Court of Common Pleas, affirmed by the Exchequer Chamber, that the fact of the defendant's name being disclosed at the time of the contract did not preclude the plaintiffs from having recourse to him; that parol evidence of the circumstances under which the contract was made, was admissible; and that the insertion of C.'s name in the contract, though his principal was known at the time, and the subsequent demands on C. for payment, did not necessarily amount to an election on the part of the plaintiffs to give credit to C., and to him only.²

Where a contract is signed by one who professes to be signing "as agent," but who has no principal existing at the time, and the contract would be wholly inoperative unless binding upon

¹ In *Sims v. Bond*, 5 B. & Ad. 389, 393, Lord Denman, in delivering the judgment of the court, says: "It is a well-established rule of law, that, where a contract not under seal is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it; the defendant in the latter case being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party." But in *Turner v. Thomas*, L. R. 6 C. P. 610, it was held, that the statute of set-off, as extended by the English Bankruptcy Act, 1869, did not apply as to the two principals in a case of unliquidated damages. See *Hudson v. Granger*, 5 B. & Ald. 27; *Rose v. Hart*, 8 Taunt. 499; *Ex parte Deeze*, 1 Atk. 228; *Chase v. Westmore*, 5 M. & S. 180; *Smith v. Hodson*, 4 T. R. 211; *Olive v. Smith*, 5 Taunt. 58.

² *Calder v. Dobell*, L. R. 6 C. P. 486. The rule is laid down by Parke, B., in *Higgins v. Senior*, 8 M. & W. 834, 844, as follows: "There is no doubt that where

such an agreement is made it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals." ["Unnamed principals there meaning principals not named in the contract itself." *Per Bovill, C. J.*, in *Calder v. Dobell*, L. R. 6 C. P. 490.] "And this whether the agreement be or be not required to be in writing by the statute of frauds; and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom on the face of it it purports to bind; but shows that it also binds another by reason that the act of the agent in signing the agreement, in pursuance of his authority, is in law the act of the principal." See also, to the same effect, *Beckham v. Drake*, 9 M. & W. 79, 96; *Trueman v. Loder*, 11 A. & E. 589; *Mortimer v. McCallan*, 6 M. & W. 58.

the person who signed it, he is personally liable on it; and a stranger cannot by a subsequent ratification relieve him from that liability. Thus, a company being projected for carrying on the business of an hotel, and purchasing the premises and stock of goods of the plaintiff, the following agreement was entered into: "Jan. 27, 1866. To A., B., and C., on behalf of the proposed Gravesend Royal Alexandra Hotel Company. I hereby propose to sell the extra stock [of goods], as per schedule hereto, for the sum of £900, payable on Feb. 28, 1866" (signed by the plaintiff). "We have received your offer to sell the extra stock as above, and we hereby agree to accept the terms proposed." (Signed) "A., B., and C., on behalf of the Gravesend Royal Alexandra Company." The goods were handed over to the representatives of the proposed company, and were consumed in the business. At a meeting of the directors of the company on Feb. 1, the arrangement was ratified by them. There was also a subsequent ratification by the company on April 11; but this was after the commencement of the action. The company obtained a certificate of incorporation on Feb. 20, but collapsed without paying for the goods. An action having been brought against the defendants, upon the agreement of Jan. 27, oral evidence was tendered for the purpose of showing that it never was intended that they should be personally liable; but it was rejected. The defence was that, inasmuch as the agreement was not entered into by the defendants personally, but only as agents for the hotel company, they thereby incurred no personal obligation to the plaintiff, who was himself one of the promoters of the company. For the plaintiff it was insisted that, there being no company in existence at the time of the agreement, the parties thereto had rendered themselves personally liable; and that there could be no ratification of the contract by a subsequently created company. This view was sustained by the court, which held that A., B., and C. were personally liable on their agreement, as for goods sold and delivered; that no subsequent ratification by the company could relieve them from that liability without the assent of the plaintiff; and that parol evidence was not admissible to show that personal liability was not intended.¹

¹ *Kelner v. Baxter*, L. R. 2 C. P. 174. Erle, C. J., in discussing the questions involved, thus states the general law: "The cases referred to in the course of the argument fully bear out the proposition that, where a contract is signed by one who professes to be signing 'as agent,' but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby; and a

stranger cannot, by a subsequent ratification, relieve him from that responsibility. When the company came afterwards into existence it was a totally new creature, having rights and obligations from that time, but no rights or obligations by reason of anything which might have been done before. It was once, indeed, thought that an inchoate liability might be incurred on behalf of a proposed company which would become binding on it when

A similar question came up in *Scott v. Lord Ebury*.¹ There, one, J., acting as the solicitor and secretary of a projected railway company, by the authority of the promoters, and by means of a cheque signed by two of them, obtained from the plaintiff an advance of £500, to be applied in payment of parliamentary fees, upon an agreement expressing that it was "to be repaid out of the calls on shares." An act authorizing the construction of the railway passed, the promoters being named therein as the first directors; and, at a meeting subsequently held, the directors passed a resolution that the acts of J. should be adopted and confirmed. No shares were allotted or calls made, and the undertaking was not proceeded with. It was held that the advance was made upon the personal responsibility of those who signed the cheque, and that the subsequent adoption of their acts by the directors did not alter their position. In answer to the contention that the original liability had been got rid of by the subsequent ratification of the contract by the company, one of the judges² said: "That, however, could have no effect; because, putting out of view the cases of assignees of bankrupts and administrators, there is no case in which a person can, by a subsequent ratification, make himself liable as principal, so as to discharge the agent, where the principal was not in existence at the time of the original contract." He likened it to the case of a man who has attained the age of twenty-one, being sought to be charged, by ratification, with a contract made when he was *in ventre de sa mere*, or before.³

subsequently formed; but that notion was manifestly contrary to the principles upon which the law of contract is founded. There must be two parties to a contract, and the rights and obligations which it creates cannot be transferred by one of them to a third person who was not in a condition to be bound by it at the time it was made." *Ib.* 183. See *Doubleday v. Musket*, 7 Bing. 110; *Hutchison v. Surrey, &c. Assoc.*, 11 C. B. 689; *Payne v. New South Wales, &c. Co.*, 10 Ex. 283; *Gunn v. London & Lancashire Fire Ins. Co.*, 12 C. B. N. s. 694; *Lewis v. Nicholson*, 18 Q. B. 503, 510; *Hall v. Ashurst*, 1 C. & M. 714; *Watson v. Murrell*, 1 C. & P. 307; *Meriel v. Wymond-sold*, Hardr. 205; *Cullen v. Duke of Queensbury*, 1 Bro. C. C. 101. The mere fact of a person professing to sign a contract, for or on behalf or as agent for another, will not *per se* prevent responsibility as a contracting party attaching to the former. *Tanner v. Christian*, 4 E. & B. 591; *Lennard v. Robinson*, 5 E. & B. 125. In *Ex parte Hartop*, 12 Ves. 349, 352, Lord Erskine says: "No rule of

law is better ascertained, or stands upon a stronger foundation, than this, — that where an agent names his principal, the principal is responsible, not the agent; but, for the application of this rule, the agent must name his principal as the person to be responsible." See *Davis v. McArthur*, 4 Greenl. 82, n.; In the Case of *The Rebecca*, 1 Ware, 205; *Roberts v. Austin*, 5 Whart. 313; *Middlesex Turnpike Corp. v. Tufts*, 8 Mass. 266. In *Roberts v. Austin*, 5 Whart. 315, Rogers, J., states the rule to the same effect as Lord Erskine, in *Ex parte Hartop*, 12 Ves. 349, 352, thus: "It is a well-established rule of law that when an agent names his principal, the principal is responsible, not the agent. But the agent must name his principal as the person to be responsible."

¹ L. R. 2 C. P. 255.

² Willes, J., at p. 267.

³ This case followed the principles laid down in *Kelner v. Baxter*, L. R. 2 C. P. 174, stated *supra*. See also *Pilbrow v. Pilbrow's Atmospheric Ry. Co.*, 5 C. B. 440, 472.

By a contract in writing, the defendants "sold to" the plaintiffs a cargo of cotton-seed cake of a specified quality. The contract contained a clause that "should any of the above goods turn out not equal to quality specified, they are to be taken at an allowance, which allowance, together with any dispute arising on this contract, is to be settled by arbitration." The defendant signed the contract with the addition of the word "brokers," and were acting as agents. Some time after the contract was signed, the defendants named their principals. The cargo proved to be of inferior quality, and an arbitration (which the plaintiffs did not attend) to determine the liability of the defendants was held. The arbitrators decided by their award that the defendants were not liable, inasmuch as a custom existed that a broker, upon naming his principals, ceased to be liable on the contract. On action by plaintiffs against defendants for damages, on the trial the jury found that the alleged custom did not exist, but judgment was entered for the defendants by Hawkins, J. On appeal, this decision was reversed, the court, Brett, M. R., and Bowen, L. J., holding — Fry, L. J., dissenting — that the defendants were personally liable on their contract, notwithstanding the award of the arbitrators, who had exceeded their jurisdiction.¹

¹ *Hutcheson v. Eaton*, 13 Q. B. Div. 861. In this case the language of the contract was: "We have this day sold to you," etc. Brett, M. R., said: "The first point taken on behalf of the defendants was that upon this contract, the defendants having signed as brokers, they were not personally liable. But according to the authorities as I understand them, where the contract is drawn up in this way, and the signature is of the name of the persons with 'brokers' added, and the contract is not signed as 'brokers,' they are personally bound; for it is said to be a signature on their own behalf, and the word 'brokers' is only a description." The other question arose out of the clause providing for an arbitration as to any allowance to be made, "which allowance, together with any dispute arising on this contract," was to be submitted to the arbitrators. The majority of the court held, and we think correctly, that this provision did not empower the arbitrators to decide that the defendants were not liable for the "allowance" to be made under the contract; because in effect they were not parties to the contract, nor had any liability under it. The very fact that under the form of the contract the defendants were held liable as principals, the agreement by the principals to submit to arbitration the question as to the extent of their liability as principals for such allow-

ance as might be decided upon by arbitrators, would seem clearly to oust jurisdiction from the arbitrators as to the liability of the defendants as principals for such allowance. By the very terms of the contract, as held by the court, the principals were estopped from denying that they were principals, and, therefore, the arbitrators had no right to exempt the defendants from their liability for an allowance on a ground which the defendants themselves could not urge. It is a question of the construction of the language used under the light of the surrounding circumstances, the important point in such construction being the concession by the defendants (under the decision as to their liability as principals) that they were to be liable as principals. The effect of the decision of the arbitrators was virtually that there was no contract with the defendants, and, therefore, there could be no liability by the defendants for the "allowance." As Bowen, L. J., said: "It is a question of altering a contract, and construing it after it has been violently altered." *Hutcheson v. Eaton*, 13 Q. B. Div. 869.

The 8 & 9 Vic. c. 109, § 18, which makes null and void all contracts by way of wagering, does not apply to the case where one makes a bet through an agent, and the agent receives the amount of the bet from the other principal. In such case an action will lie against the agent by his

Where a written contract was made by brokers on behalf of undisclosed principals, for the sale of hides, which provided that "if any difference or dispute shall arise under this contract, it is hereby mutually agreed between the sellers and buyers that the same shall be settled by the selling brokers, whose decision in

principal for the money received on the bet. *Bridger v. Savage*, 15 Q. B. Div. 363. In *Tenant v. Elliott*, 1 B. & P. 4, Buller, J., says: "Is the man who has paid over money to another's use to dispute the legality of the original consideration? Having once waived the legality the money shall never come back into his hands again. Can the defendant then in conscience keep the money so paid? For what purpose should he retain it? To whom is he to pay it over? Who is entitled to it but the plaintiff?" And in *Beeston v. Beeston*, 1 Ex. Div. 13, Pollock, B., says: "The statute is directed against suits brought for recovering on any contract by way of wagering. That applies to actions brought by one party to a wager against the other, or by either against the stakeholder." *Beyer v. Adams*, 26 L. J. Ch. 841, held that the claim of the winner of a bet to be paid out of the assets of the deceased, the amount which the loser had placed in his hands for the winner, should be disallowed. But that case has been overruled. The decisions are very clear that the agent cannot set up the illegality of the contract upon which money came to his hands as a defence to an action by his principal for the money. *Tenant v. Elliott*, 1 B. & P. 3; *Evans v. Pratt*, 4 Scott N. R. 378; *Lyne v. Siesfield*, 1 H. & N. 278; *Hastelow v. Jackson*, 8 B. & C. 221; *Lubbock v. Potts*, 7 East, 449; *Vandek v. Hewitt*, 1 East, 96; *Bonsfield v. Wilson*, 16 M. & W. 185. The money paid into the hands of the winner is held by him for the winner without regard to the circumstances under which it was obtained by or became payable to him. Thus where money has been paid into the hands of a third party by the loser of a wager for the winner, and such third party, instead of paying the money to the winner, has given him a bill of exchange or promissory note for it, the amount of the bill or note has been held recoverable by the winner from the deposit. *Johnson v. Lansley*, 12 C. B. 468; *Knight v. Cambers*, 15 C. B. 562; *Knight v. Fitch*, *Id.* 566; *Fitch v. Jones*, 15 El. & B. 238; *Oulds v. Harrison*, 10 Ex. 572; *Jessop v. Lutwyche*, 10 Ex. 614. In *Sharp v. Taylor*, 2 Phil. 801, Lord Cottenham distinguishes between enforcing illegal contracts and asserting title to money which has arisen from them in a case where money was received by one

party for himself and another as the freight of a vessel on an alleged illegal voyage. Lord Cottenham says: "The plaintiff is not seeking compensation and payment for an illegal voyage; that matter was disposed of when the defendant received the money; and the plaintiff is now only seeking for payment of his share of the realized profit. The violation of law suggested was not any fraud upon the revenue or omission to pay what might be due; but, at most, an invasion of a parliamentary provision supposed to be beneficial to the ship-owners of this country, an evil, if any, which must remain the same whether the freight be divided between the plaintiff and defendant according to their shares or remain altogether in the hands of the defendant. As between these two, can this supposed evasion of the law be set up as a defence by one against the otherwise clear title of the other? In this particular suit, can the one tenant in common dispute the title common to both? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that in realizing it some provision in some act of parliament has been violated or neglected? Can one of two partners in any import trade defeat the other by showing that there was some irregularity in passing the goods through the custom-house? The answer to this, as to the former case, will be that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do, as between the parties. Do the authorities negative this view of the case? The difference between enforcing illegal contracts and asserting title to money which has arisen from them is distinctly taken in *Tenant v. Elliott* (1 B. & P. 3), and *Farmer v. Russell* (1 B. & P. 296), and recognized and approved by Sir Wm. Grant in *Thomson v. Thomson* (7 Ves. 473)." And see *Read v. Anderson*, 10 Q. B. Div. 100; 13 Q. B. Div. 779; *Hawson v. Hancock*, 8 T. R. 575; *Camden v. Anderson*, 1 B. & P. 272; *Farmer v. Russell*, 1 B. & P. 296; *Webb v. Brooke*, 3 Taunt. 6; *Davis v. Edgar*, 4 Taunt. 63; *Bensley v. Bignold*, 5 B. & Ald. 333; *Lacaussade v. White*, 7 T. R. 535; *Cannan v. Bryce*, 3 B. & Ald. 179; *Nockels v. Crosby*, 3 B. & C. 814, 819; *Bate v. Cartwright*, 7 Price, 540, 542.

writing shall be final and binding on both sellers and buyers ;” in an action against the brokers in respect of inferior hides delivered under the contract, the buyers made a claim for the breach against the brokers, as principals, by custom of the trade. It was held that evidence of a custom of the trade, that a broker who does not disclose his principal is personally responsible for the performance of the contract and liable for the breach, was rightly rejected, as such custom was inconsistent with the arbitration clause, which would, if the custom were incorporated, make the brokers judges in their own cause.¹

The defendant, a stockholder, who had undertaken to sell shares of a joint stock bank, for the plaintiff, a shareholder, sold them to a jobber on the Stock Exchange, and sent an advice note of such sale to the plaintiff, but, in accordance with the custom of the Stock Exchange, the bought and sold notes between the defendant and the jobber omitted to state the name of the registered proprietor of the shares, as required by 30 and 31 Vic., c. 29, by reason of which the contract for sale was void ; and the bank having stopped, and an order for its winding-up having been made before the day on which the jobber was entitled to name the person willing to be the purchaser, the contract for sale was repudiated, and the plaintiff remained the holder of the shares. Held, that the defendant had committed a breach of duty in not making a valid contract of sale, notwithstanding the custom of the Stock Exchange to disregard the said statute, as such custom was both unreasonable and illegal, and that for such breach of duty the plaintiff was entitled to recover from the defendant, by way of damages, the price at which the shares had been sold.²

3. RIGHTS, POWERS, AND LIABILITIES, AS BETWEEN PRINCIPALS AND AGENTS.

These matters we consider in this section so far as it is necessary for our purposes to do so, in connection with questions which have arisen relating to Sales, or are incidental thereto.

¹ *Barrow v. Dyster*, 13 Q. B. Div. 635. It is noteworthy that in this case the contract was for foreign principals, but this did not at all affect the construction of the contract, as it sufficiently appeared on the face of the contract that it was made by brokers for principals ; and in such case it does not at all affect the construction of the contract as regards the liability or non-liability of the agent, whether the principals are home or foreign principals. The arbitration clause in *Barrow v. Dyster*, 13 Q. B. Div. 635, constituting the brokers arbitrators, was equivalent to

an express provision in the contract that the brokers were not to be principals, notwithstanding the custom ; and that, therefore, the custom was not to be incorporated into the contract, a contract which it was competent for the parties to make. On this ground the soundness of the case would seem scarcely to admit of doubt.

² *Neilson v. James*, 9 Q. B. Div. 546. See *Rudge v. Bowman*, L. R. 3 Q. B. 689 ; *Bowring v. Shepherd*, 6 Q. B. 309. See also cases bearing on the subject of this section in succeeding sections in this Part.

The plaintiff, a merchant in London, gave orders to the defendants, commission agents in Hong Kong, to purchase for him a quantity of a certain kind of opium. The defendants, upon such orders, purchased and shipped to the plaintiff, opium which they erroneously supposed to be of the description ordered, but which was really of an inferior description. The plaintiff sought to recover as damages in an action against the defendants the difference between the value of the opium ordered and that of the opium actually shipped by the defendants, on the ground that the relation between the defendants, as commission agents, and himself, was that of vendor and vendee of the opium. Held, that the true measure of damages was not the difference between the value of the goods ordered and that of those shipped, but the loss actually sustained by the plaintiff in consequence of the opium not being of the description ordered.¹

The defendants were brewers, and employed F. as their "malting agent." The regular course of business between the defendants and F. was as follows: F. occupied the malting premises, and took out the necessary licenses. It was his duty to buy barley in his own name, as principal, for cash; to send in to the defendants certain periodical accounts of the barley so bought from time to time, and the prices of the same; to submit samples to the defendants, and if the barley was approved of by them, to

¹ *Cassaboglou v. Gibbs*, 9 Q. B. Div. 220. The court, in delivering judgment, say: "The plaintiff seeks to treat the defendants as vendors of the opium to him, and to hold them responsible for damages as for a breach of warranty of the kind and quality of the goods, in which case the measure of damages would be not merely the difference between the cost to him of the goods and their real value, but the difference between the value of goods of the description sold and of the goods actually sent. A single illustration is sufficient to show the fallacy of the plaintiff's contention. Suppose one instructs a commission agent to purchase for him a very valuable original picture if it should be offered for sale, and the agent carelessly bids for a picture under the belief that it is the original, and it is knocked down to him for say £100; and he informs his employer that he has bought the picture for that sum, and his employer remits the money, and the picture is forwarded, but upon arrival is discovered to be merely a copy. The employer rejects the picture and it is sold for £90. Now, suppose that if it had been the original picture it would have been worth £1000. Is the agent liable for £910 damages, or only for the actual

loss caused to his employer through his want of care and skill? It seems to us that the latter is the true measure of damages, and, therefore, that our judgment should be for the defendants." *Ibid.*, p. 224. The case was taken before the Court of Appeal, on appeal, when the judgment of the Queen's Bench Division was sustained. *s. c. nom. Cassaboglou v. Gibb*, 11 Q. B. Div. 797. This is another case where the relation of home agent and foreign principal existed, and it was strongly urged that it became, therefore, in effect a relation between vendor and vendee, and that the agent was liable as a principal as such vendor. But both courts held the reverse, and construed the contract in precisely the same way as though it had no reference whatever to a foreign principal. But, of course, as in *Turner v. Liverpool Dock Trustees*, 6 Ex. 543, it is competent for one acting as agent — for instance, in purchasing goods for his principal, and paying his own money for the goods — to assume the position, and be remitted to the rights, as to stoppage *in transitu*, etc., of a vendor or *quasi* vendor. *Feise v. Wray*, 3 East, 93; *Siffken v. Wray*, 6 East, 371; *Tucker v. Humphrey*, 4 Bing. 516.

malt it and deliver the malt to the defendants, receiving a commission upon the quantity of barley steeped. The quantity of malt required by large brewers being very great, the brewers, and not the malting agents, provide the capital for the purchase of the barley. In the present case, the defendants kept accounts at certain provincial banks, upon which F. was empowered to draw, and from time to time the defendants paid in lump sums to the credit of those accounts, in accordance with current requirements, as shown by the accounts sent in by F. of barley purchased, but these sums were not intended to, nor did they represent any payment for any specific barley. F.'s business was to act as malting agent for the defendants exclusively. The defendants paid the duty as the same became payable upon the malt in F.'s premises. F. had fraudulently departed from the regular course of business. Instead of buying barley for cash and applying the balances at the provincial banks in payment for the same, he had been in the habit of sending into the defendants fictitious accounts of barley purchased, misapplying the sums paid in for his own purposes, and providing the malt needed for the defendants' purposes by purchasing barley or ready-made malt upon credit. He likewise from time to time sold barley which had been brought on to the maltings to raise money for his own purposes. The defendants believed, in consequence of the fictitious accounts and other false representations of F., that barley was from time to time purchased for cash, in accordance with the regular course of business, and on the faith thereof continued to pay sums of money into the banks for the purpose of paying for such barley, which they believed were so applied. F. subsequently absconded, leaving upon his premises barley to the value of about £22,000, and malt to the value of about £35,000, upon part of which duty had been paid by the defendants. The value of such malt and barley was less than the amount drawn from the banks and misappropriated by F. He absconded, and thereby committed an act of bankruptcy. Between the time of F.'s absconding and the time when he was adjudged a bankrupt, the defendants seized the barley and the malt left on his premises. The plaintiff, trustee in F.'s bankruptcy, sued the defendants for the value of the same. Held, by the Queen's Bench Division, that the plaintiff could not recover, on the ground that the relation between the defendants and F. was that of principals and agent, and that the property in the barley and the malt was not in the order and disposition of F. as the reputed owner thereof, it being notorious that "malting agents" are in many instances not the owners of the barley and malt on their malting premises; and also on the further ground that the

moneys advanced by the defendants to provide for the purchase of the barley were impressed with a trust; that even if the barley and the malt left on the premises of F. were not bought in accordance with the authority given to him, and the legal property in the same was not vested in the defendants, but in F., nevertheless F. was a trustee for the defendants to the extent of the sums advanced by them, of such barley and malt, the same being either the product of the trust-moneys, or in substitution for the barley in payment for which F. ought to have applied such trust-moneys; and F. could not have set up his own breach of trust or have been heard to allege that the barley was bought otherwise than according to the authority given to him by the defendants; and that the plaintiff, as F.'s trustee in bankruptcy, could not in this respect stand in a better position than F. himself.¹

¹ *Harris v. Truman*, 7 Q. B. Div. 340. On appeal to the Court of Appeal, 9 Q. B. Div. 264, from the Queen's Bench Division, the judgment of the court below was sustained, the two points involved in the case being thus disposed of by Lord Coleridge, C. J., who says: "The judgment of the court below is founded mainly on two grounds. The first ground is of this nature, — When large amounts of money are intrusted to a man to buy goods and to carry on a business, he becomes a trustee for the person to whom the money belongs, and the proceeds of the money are affected with a trust. This is an old and well-established doctrine in equity: it applies where the relation of principal and agent in the ordinary sense of the words does not exist. According to this doctrine, where a confidence is created between two persons, and where the one receives the money on the faith that he will do a certain thing, and leads the other who has given the money to understand that the thing has been done, as between these two persons it is considered in equity to have been done. Therefore the person receiving the money is bound to hold what he gets for the benefit of the person giving the money. I think that this ground is quite right. I think that the second ground of the judgment of the Queen's Bench Division is right also. A person placed in a fiduciary relation with another may have dealings of his own, and may mix up his own dealings with the dealings on behalf of his *cestui que trust*; but it has been held in courts of equity that when a fiduciary relation has been created in respect of a fund which has been misapplied, and when it cannot be shown what portion of the proceeds of the fund is really subject to the trust, the trust shall be considered to be attached to the whole of the proceeds, and it shall

not lie in the mouth of the trustee to say that any portion of those proceeds is not affected with the trust. The same rule is applied where, by a long course of dealing and by constant representation, a person intrusted with money is fulfilling for the benefit of his employer the duties which have been cast upon him by his employment. In a case of this description the person employed is estopped from setting up the real state of matters, because his employer has dealt with him on the faith of his representation that another state of things existed. These are the grounds upon which the judges of the Queen's Bench Division have held that the defendants are entitled to succeed. As the agent could not have denied the fiduciary obligation, and would have been estopped from setting up the facts as they actually existed, his trustee in bankruptcy can be in no better position than himself."

The trustee in bankruptcy or executor, who derives the property by bankruptcy or through death, can be in no better plight than the person he represents would have been, and holds it when it comes to his hands in trust for and applicable to the same purposes as the person he represents held it for. *Taylor v. Plumer*, 3 M. & S. 562; *Godfrey v. Furzo*, 3 P. Wms. 185; *Thompson v. Giles*, 2 B. & C. 422; *Frith v. Cartland*, 2 H. & M. 417; *In re Hallett's Estate*, 13 Ch. Div. 696, 707. If an agent or trustee mixes trust property with his own so that he is unable to distinguish which is his own, the whole will be treated as trust property, subject to any equitable claim which the agent or trustee may be able to establish. See *Spence v. Union Marine Ins. Co.*, L. R. 3 C. P. 427, 437; *In re Hallett's Estate*, 13 Ch. Div. 719; *Pennell v. Deffell*, 4 De G. M. & G. 372.

The mere fact of filing an affidavit of proof against the estate of an insolvent agent to an undiscovered principal, after that undiscovered principal is known to the creditor, is not a conclusive election by the creditor to treat the agent as his debtor.¹

In *Curtis v. Williamson*,¹ B. purchased certain goods of the plaintiffs; B. being the agents of the defendants, his undisclosed principals. B. became insolvent, and the plaintiffs then became aware that the defendants were principals. With this knowledge, the plaintiffs' clerk sent an affidavit of proof of the debt due to them against the estate of B., whose affairs were being liquidated by arrangement. The plaintiffs endeavored to prevent the affidavit of proof from being filed, but were unsuccessful. The plaintiffs having brought this action, the defendants pleaded never indebted. At the trial before Quain, J., a verdict was entered for the plaintiffs; leave being reserved to the defendants to move to enter a nonsuit. The court were of the opinion that it would be going much too far to hold that all that was done in this case by the plaintiffs was in point of law sufficient to constitute a binding election to deal with the agent as alone liable, and to abandon all right to take proceedings against his principals; that what had taken place might, in an appropriate case, constitute with other facts some evidence of election to be submitted to a jury; but that what had taken place could not be regarded in itself as a legal bar to proceedings against the defendants. The verdict, accordingly, was sustained.²

¹ *Curtis v. Williamson*, L. R. 10 Q. B. 57.

² In delivering judgment, Quain, J., said: "There can be no doubt that, in the absence of any alteration of the account to the prejudice of the principals, the plaintiffs, on discovering that B. was merely an agent for the defendants, had a right within a reasonable time (*Smethurst v. Mitchell*, 1 E. & E. 622) to elect to proceed against the defendants (*Thompson v. Davenport*, 9 B. & C. 78, 86); unless in the mean time, with full knowledge as to who were the principals, and with the power of choosing between them and the agent (*Addison v. Gandasequi*, 4 Taunt. 574; *Paterson v. Gandasequi*, 15 East, 62), they had distinctly and unquestionably elected to treat the agent alone as their debtor." *Curtis v. Williamson*, L. R. 10 Q. B. 59. See *Calder v. Dobell*, L. R. 6 C. P. 486; *Priestly v. Fernie*, 3 H. & C. 977. In *Thompson v. Davenport*, 9 B. & C. 78, 86, Lord Ten-
 tender says: "I take it to be a general rule that, if a person sells goods suppos-

ing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the mean time have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if at the time of the sale the seller knows not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and, notwithstanding all this knowledge, chooses to make the agent his debtor, dealing with him and him alone, then, according to the cases of *Addison v. Gandasequi* (4 Taunt. 574), and *Paterson v. Gandasequi* (15 East, 62), the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other." See *Smyth v. Anderson*, 7 C. B.

The case of *Hollins v. Fowler*¹ is an interesting and important one, the careful study of which cannot but be instructive to the student of law. It is an appeal to the House of Lords from the Exchequer Chamber, affirming the judgment of the Queen's Bench. It is interesting in more respects than one. The reporter's first head-note to the case is, as a proposition of law, not a little startling. It is as follows: "Any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion." This language is found in the judgment of Lord Chelmsford alone,² and nothing at all equivalent to it is found in the judgments of either of the other members of the House, nor in the opinions of the judges who were called in for consultation. It contains two very doubtful propositions, viz.: first, as to whether a *bonâ fide* purchaser of goods obtained fraudulently from the owner is necessarily guilty of a conversion. Entirely independent of the question of sale in market overt, it is quite clear that if A. sell goods to B., — not to C. pretending that he is B., as in *Hardman v. Booth*,³ and other cases; but *bonâ fide* sells to B., — but, through the fraud of B. in making the purchase, the sale is voidable at the election of A.; if C., without knowledge of the fraud, purchase the goods from B. before A. has avoided the sale, it is quite clear that the property passes to C., and that, though he dispose of the goods "for his own benefit," he is not "guilty of a conversion."⁴ As far, therefore, as Lord Chelmsford's proposi-

21; *Heald v. Kenworthy*, 10 Ex. 739; *Thompson v. Davenport*, 9 B. & C. 78. In *Priestly v. Fernie*, 3 H. & C. 982, the following limitation is named by Bramwell, B.: "If this were an ordinary case of principal and agent, where the agent, having made a contract in his own name, has been sued on to judgment, there can be no doubt that no second action would be maintainable against the principal. The very expression that where a contract is so made the contractee has an *election* to sue agent *or* principal, supposes he can only sue one of them; that is to say, sue to judgment. For it may be that an action against one might be discontinued, and fresh proceedings be well taken against the other. Further, there is abundance of authority to show that where the situation of the principal is altered by dealings with the agent as principal, the former is no longer subject to an action." See *Morgan v. Conchman*, 14 C. B. 100; *Bottomley v. Nuttall*, 5 C. B. N. s. 122; *Smyth v. Anderson*, 7 C. B. 21; *Leggat v. Reed*, 1 C. & P. 16;

Edwards v. Smith, 12 J. B. Moore, 59. See *post*, note 1 to p. 561.

¹ L. R. 7 H. L. 757.

² *Id.* p. 795.

³ 1 H. & C. 803.

⁴ A fraudulent sale is voidable only, and the property vests in the fraudulent vendee till the vendor does some act to disaffirm the transaction, and it is too late to do so when the vendee has transferred the goods to an innocent purchaser. *Load v. Green*, 15 M. & W. 216; *White v. Garden*, 10 C. B. 919; *Stevenson v. Newnham*, 13 C. B. 303; *Parker v. Patrick*, 5 T. R. 175. It is essential, however, for the operation of this doctrine, that there should have been a contract of sale by means of which the property was obtained from the owner, for if the goods were obtained by a mere fraud without any contract to support the transfer of the property, there was no title in the fraudulent transferee which he could transfer to a third party. *Kingsford v. Merry*, 1 H. & N. 503, overruling s. c. 11 Ex. 577; *Peace v. Gloaghe*, 3 Moo.

tion is a controversion of this, — and it requires a good deal of hypercriticism not to make it so, — it is much too broadly stated. Mr. Justice Blackburn's somewhat analogous statement,¹ "If there has been what amounts in law to a conversion of the plaintiffs' goods by any one, however innocent, that person must pay the value of the goods to the real owners, the plaintiffs," is a much safer statement.

The latter part of the clause quoted from Lord Chelmsford's judgment, that such a disposition, "whether for his own benefit or that of any other person," makes the party "guilty of a conversion,"² is, also, open to grave question. A proposition so

P. C. N. S. 556; *Hardman v. Booth*, 1 H. & C. 803; *Gurney v. Behrend*, 3 El. & Bl. 622; *White v. Garden*, 10 C. B. 919; *Parker v. Patrick*, 5 T. R. 175; *Stevenson v. Newman*, 3 Camp. 92; *Barrow v. Coles*, 13 C. B. 285, 302; *Patten v. Thompson*, 5 M. & S. 359; *In re Westzinthus*, 5 B. & Ad. 817; *Dyer v. Pater-son*, 3 B. & C. 38; *Lord v. Green*, 15 M. & W. 219; *Wright v. Lawes*, 4 Esp. 82; *Sheppard v. Shoolbred*, Car. & M. 61. In this last-named case, Lord Abinger said; "The case proposed by the plaintiffs is, that where the goods are fraudulently obtained and sold, no property passes to the vendee, and such is undoubtedly the fact; but Sir T. Plumer's Case (3 M. & S. 562) shows, that when the original owner consents to the transfer, that effect does not follow. If the goods in this case were obtained by fraud, yet, if the defendants were not privy to that fraud, I am of opinion that they are not liable in this action." Where a sale of goods is procured by fraud, the sale is not void, but voidable by the vendor, and until it is so avoided, the vendee may give a perfect title to a *bonâ fide* purchaser without notice of the fraud. *Rowley v. Bigelow*, 13 Wend. 570; *Williams v. Given*, 6 Gratt. 268; *Thompson v. Lee*, 3 W. & S. 479. See *Robinson v. Dauchy*, 3 Barb. 20; *Jackson v. Summerville*, 13 Pa. St. 353, where, in the one case, the purchase, from the fraudulent holder, was not made *bonâ fide*, and, in the other case, the purchase-money had not been paid to the fraudulent seller. See, further, *Higgins v. Burton*, 26 L. J. Ex. 342; *Powell v. Heyland*, 6 Ex. 67.

¹ *Ib.* at p. 764.

² In this case (*Hollins v. Fowler*, L. R. 7 H. L. 766), Blackburn, J., says: "On principle, one who deals with goods at the request of the person who has the actual custody of them, in the *bonâ fide* belief that the custodian is the true owner, or has the authority of the true owner,

should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods, or intrusted with their authority." Brett, J., in the Exchequer Chamber, thus states the law: "Where one, with intent to make them his own, actually takes as his own, or actually destroys or actually uses as a man uses his own, the goods of another, it is not difficult to determine that he has done an act intentionally inconsistent with the dominion of any one but himself as real owner of the goods, and has been guilty of a wrongful conversion of the goods. It is easy to understand how it was held that in such cases the innocence of the defendant, in the sense of his not knowing who the real owner was, or that the person from whom he immediately took the goods was not the real owner, was immaterial; the defendant has taken the goods with intent that they should be his own, or has used them as if they were his own. Such acts must necessarily be contrary to the rights of a real owner who has not authorized him so to take or so to use. So if one be in possession of goods under the belief that he has a right to maintain possession, and they be demanded of him and he absolutely refuse to deliver them, he has intentionally exercised over them a dominion intentionally inconsistent with the alleged right of him in whose name they were demanded, and in such case it is not difficult to say that the defendant, if the demand was made on behalf of the real owner, has been guilty of a wrongful conversion. But it is where one has dealt with goods as if they were his own without having had possession of them, or where one has taken goods into his possession, but not with intent that they should be his own, or without reference to their being the property of one person or of another, or having goods in his possession has not used them as his own, and where

widely stated as that is quite wide enough to cover the case of an agent acting in such disposition for his principal ; a position for

no demand has been made on him for a delivery of the goods to or on behalf of the real owner whilst they were in his, the defendant's, possession, that the real difficulties arise. As to the first, I think it may be rightly said that in no case can a man be guilty of a conversion who has not by himself or his agent had possession of the goods in dispute. A man might, I apprehend, be guilty of a conversion, though he had had possession only by his agent ; as if he had authorized an agent to take goods for him, or to use or destroy them, and the agent had obeyed his commands ; but if the order had been given and had not been obeyed, I apprehend that the mere order would not be a conversion. So if one enters into a contract to sell, as if they were his own, the goods of another, whether the form of the contract be such as would assume to pass the property at once, or such as could only pass the property on a subsequent delivery, I apprehend that the mere fact of making such a contract is not a conversion. . . . On the whole, I come to the conclusion that a broker who, acting only as such, negotiates a bargain of purchase and sale and passes a delivery order is not thereby guilty of a conversion, so as to be liable in an action of trover ; and, that, in this case, the asportation, which we are bound to consider, according to the leave reserved, as a simple asportation, without reference or intention as to whose was the property in the goods, is likewise not a conversion." *Fowler v. Hollins*, L. R. 7 Q. B. 626, 631. And, in the House of Lords : "I am still of opinion that a possession or detention which is a mere custody or mere asportation made without reference to the question of the property in chattels is not a conversion." *Hollins v. Fowler*, L. R. 7 H. L. 785. Blackburn, J., too, although holding, with a good deal of diffidence, that the defendant was liable for a conversion ; in answer to the question, "Suppose that the defendant had sent the delivery order to M., who had handed it to the railway company, requesting them by means of it to procure the goods in Liverpool, and carry them to Stockport, and the railway company had done so, would the railway company have been guilty of a conversion?" replied : "I apprehend the company would not, for merely to transfer the custody of goods from a warehouse at Liverpool to one at Stockport, is *prima facie* an act justifiable in any one who has the lawful custody of the goods as a finder, or bailee, and the railway company, in

the case supposed, would be in complete ignorance that more was done." *Ibid.* L. R. 7 H. L. 767. It is thus obvious that Blackburn, J., no more than Brett, J., and the other judges who concurred with him, agreed with Lord Chelmsford, or with the head-note of the case, that "any person, who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion." This would not only cover the case of the railway company put by Blackburn, J., but also the case of the miller who had honestly ground oats and delivered the meal to the person who brought the oats to him, before he had even heard of the true owner ; and the other cases of a packer, a warehouse-keeper, and an innkeeper, also referred to by Blackburn, J. In fact, on the strict holding of the case, on the finding of the jury, it would be difficult to see if the defendant were correctly held liable for a conversion, why his clerk who obtained the cotton on the delivery order, or the carter who carted it to the railway, or the cotton manufacturer's men "who assisted in turning the cotton into twist," would not all be equally as liable. Against this holding is, obviously, another of the judges, who, distorting the finding of the jury, held that the defendant was liable ; Mr. Justice Mellor, who says : "If, by reason of the finding of the jury, I must eliminate from the facts that the plaintiff in error bought the cotton having at the time no principal, and substitute for it a statement that he bought the cotton as agent for M. & Co., and merely passed the delivery order and transported the cotton as their agent, in the usual course of his business as broker, then, I think, that the defendant would not be liable in this action, and the remedy of the plaintiffs would be against M. & Co., who actually converted the cotton by spinning it into yarn and selling it." *Ib.*, p. 775. And yet the leave reserved, pursuant to the finding of the jury, assumed that the defendant had "acted throughout honestly, in the ordinary course of business, having bought and paid for the cotton *only as agent for M. & Co.*," and had "*dealt with the goods only as agent to forward them.*" *Fowler v. Hollins*, L. R. 7 Q. B. 620, note (1).

The cases in refutation of the second portion of Lord Chelmsford's proposition are quite numerous. In *Mires v. Solebay*, 2 Mod. 242, it was held that trover will

which *Hollins v. Fowler*¹ is very far from being an authority. True, among the opinions of the large number of members of the House, and judges assisting, there were some opinions that would

not lie against a servant for an unlawful intermeddling with the goods of any person by the command of his master unless such intermeddling amounts to a trespass; and then an action of trespass will lie against the servant, though done by the command of the master. Following this case, in *Alexander v. Southey*, 5 B. & Ald. 247, where goods, the property of the plaintiff, had been, by the servants of an insurance company, carried to a warehouse, of which the defendant, a servant of the company, kept the key, and the defendant on being applied to by the plaintiff to deliver them up refused to do so without an order from the company, it was held that this was not such a refusal as amounted to a conversion of the goods by the defendant. So, by *Coles v. Wright*, 4 Taunt. 198, a servant delivering goods by his master's order could not be said to have converted those goods as against the assignee in bankruptcy of his master. In *Greenway v. Fisher*, 1 C. & P. 190, it was held that a packer having in the exercise of his business shipped goods under the orders of a person who employed him for that purpose, was not guilty of a conversion. In *Lee v. Bayes*, 18 C. B. 609, Willes, J., refers to the railway case named by Blackburn, J., where trover was brought against the Southeastern Railway Company for certain timber, by the assignees of a bankrupt, and the Court of Exchequer expressed a strong opinion that the action would not lie, the timber having been handed over by the company, pursuant to the directions of the bankrupt, before they had any notice of the title of the assignees. In *Ross v. Johnson*, 5 Burr. 2825, it was held that though there might be an action on the case against a wharfinger for goods which had been stolen from him, yet trover would not lie against him. Lord Mansfield said: "In order to maintain trover there must be an *injurious* conversion. This is not to be esteemed a refusal to deliver the goods." The principle laid down in *Fouldes v. Willoughby*, 8 M. & W. 540, is that a mere wrongful asportation does not amount to a conversion unless the taking or detention of the chattel is with intent to convert it to the taker's own use or that of some third person, or unless the act done has the effect of destroying or changing the quality of the chattel. In this case the master of a ferry-boat was held not liable in trover for unlawfully setting a passenger's horses ashore, although the owner never recovered them. In *Drake*

v. Shorter, 4 Esp. 165, where the defendant took a boat belonging to the plaintiff for the purpose of extinguishing a fire, and the boat was sunk and lost, Lord Ellenborough said: "That what might be a *trover* under one circumstance might if done under others assume a different appearance. As, for example, if the thing for which the action was brought, and which had been lost, was taken to do a work of charity, or to do a kindness to the party who owned it, and without any intention of injuring it or of converting it to his own use, if under any of these circumstances any misfortune happened to the thing it could not be deemed an illegal conversion; but as it would be a justification in an action of trespass it would be a good answer to an action of trover." It is not every wrongful act depriving a party of the possession of his goods that amounts to a conversion. Hence, in *Thorogood v. Robinson*, 6 Q. B. 769, where plaintiff's goods and servants were on land which defendant recovered in ejectment, and defendant on entering under the writ of possession turned plaintiff's servants off the land, and would not let them remain for the purpose of removing the goods, it was held that the jury might find that there was no conversion. Of the conversion evidence may arise from a tortious taking, from a refusal to deliver upon demand, or from use negating the plaintiff's right. Any act in exclusion or defiance of the plaintiff's right, any assumption of property and of the right of disposition, any intermeddling indicating a claim of ownership, any assertion of the control which belongs to the owner, may furnish evidence of the conversion. But an interference with a chattel under circumstances which show the owner's right to be undisputed, even with injurious consequences to the owner, does not amount to a conversion; as where goods are thrown overboard to save a ship, or where a work of charity or kindness to the owner is intended. *Nelson v. Whetmore*, 1 Rich. (S. C.) 318, 322; *Hoover v. Alexander*, 1 Bail. 510; *Quay v. McNinch*, 2 Mill. (La.) 78; *Bell v. Lakin*, 1 McMul. 364. See, further, *Needham v. Rawbone*, 6 Q. B. 771, note *b*; *Simmons v. Lillystone*, 8 Ex. 431; *Heald v. Carey*, 11 C. B. 977; *Lancashire Wagon Co. v. Fitzhugh*, 6 H. & N. 502; *Vaughan v. Watt*, 6 M. & W. 492; *Isaac v. Clark*, 2 Bulst. 312; *Green v. Dunn*, 3 Camp. 215, n.; *Bushnell v. Miller*, 1 Str. 128.

¹ L. R. 7 H. L. 757.

go that far, yet the general *consensus* of opinion was the other way, and the conclusion as to the defendant's liability in the case was only reached on the assumption that, in the transaction, he bought the goods and disposed of them, not in his capacity of agent for another, but as a principal. We think, therefore, that as an analytical note of what the case really holds, it is, on both points, too broadly stated, even though it is a literal quotation of language used by one of the members of the House who took part in the case.

The case otherwise, though decided by England's ultimate court of appeal, the House of Lords, is fairly open to criticism, and the correctness of the decision is extremely doubtful. The respondents (plaintiffs below)¹ Fowler & Co., of Liverpool, were owners of cotton. B., pretending to be the agent of S., got possession of the cotton under a fraudulent purchase, as a sale to S., and offered it for sale to the appellants, brokers, on Dec. 23, at Liverpool; who purchased it. The appellants had on that morning received a message from M. & Co., cotton spinners (for whom they were in the habit of purchasing cotton), stating that M. would be in Liverpool to purchase cotton through the appellants, who had bought the cotton from B., believing it to be of the sort which M. & Co. would require. On examining the cotton, M. agreed to take it. The appellants were in the habit of thus buying cotton in the belief that their customers would take it. If any particular customer did not take to the cotton thus speculatively purchased for him, the appellants disposed of it to some other customer. On the latter part of Dec. 23, B. received a delivery order from the appellants, as follows: "Please deliver the bearer . . . cotton, etc., bought this day for M. & Co." The cotton was delivered on the following morning to the appellants, by whom it was at once forwarded to M. & Co. B. received the price of the cotton from the appellants, which was repaid by M. & Co., together with a sum for commission and portorage, the appellants not obtaining a profit on the cotton, but merely receiving a broker's commission on its purchase. Fowler & Co., not having received payment for the cotton at the stipulated time for payment, applied to S., and then learnt that he had never employed B. to purchase the cotton for him. Application was then made to the appellants for the cotton, who replied: "The cotton was bought by M. & Co. for cash, and has been made into yarn long ago, and as everything is settled up, we regret we cannot render you any assistance." The respondents, Fowler & Co., then brought an action of trover against the defendants. So far, the case is one of extreme simplicity, and its very simplicity is what led, we think, to an incorrect decision

¹ L. R. 7 Q. B. 616.

by the Queen's Bench, the Exchequer Chamber, and the House of Lords, under the changed aspect of the case.

The cause went to trial before Justice Willes, and, under the facts as stated, the verdict and judgment, as all the judges in effect admit, should have been for the plaintiffs. As under the fraudulent pretence by B., that it was S. who was buying the cotton, as the plaintiffs had not sold the property to B., the right to the possession remained in the plaintiffs. As the cotton had been purchased by the defendants, who had taken to the possession of it as owners, and had re-sold it to M. & C^o., who might or might not have bought it, there was a clear conversion by the defendants; and it was an altogether immaterial factor in the case that they usually did business as agents and brokers; and that, on their selling the cotton, they re-sold it to parties for whom they were accustomed to purchase cotton, and sold it to them simply at the price they had themselves paid for it, with an additional sum which they called "commission." The law in such a case is entirely too clear for doubt. But the difficulty in the case which led to what seems to us a series of incorrect judgments, which we do not think the ablest conducted courts of this country would follow, thus occurred. When the facts which we have pretty fully summarized were proved on the trial, the judge left two questions to the jury, namely: first, whether the cotton in question had been bought by the defendants as agents in the course of their business as brokers; and secondly, whether they dealt with the goods as agents for their principals. The jury answered both of these in the affirmative; and, according to the whole *consensus* of opinion of the judges, so far as those answers mean (as we think it is too clear for question that they do mean) that the defendants purchased the cotton only as agents, and not as principals; and that they dealt with the cotton as agents only for their principals; and that, therefore, by their purchase of the cotton no property vested in themselves, the jury *answered the questions wrongly*. In accordance with the answers of the jury, obviously understood, as, without scholastic refinement and judicial perversion, any one would understand them, Willes, J., "directed the verdict to be entered for the defendants, reserving leave to the plaintiffs to move to enter the verdict for them." A rule was afterwards obtained for that purpose in the Queen's Bench, which was made absolute. On appeal to the Exchequer Chamber, the judges were equally divided in opinion. The case was then appealed to the House of Lords, and the judges were called in for consultation. As we have shown, and as was all around with scarcely an exception conceded, independent of the questions submitted to the jury

and their answers, on the facts of the case, the verdict and judgment should have been for the plaintiffs. An application was made to the Court of Queen's Bench for a rule as for misdirection, or as for a verdict against evidence. Had this been granted, as it clearly should have been, the whole difficulty in the case would have been avoided, and we would not have had the bad law which, as applied to the actual, express finding of the jury in the case, we cannot but think the case contains. But the Court of Queen's Bench, improperly, we think, instead of granting the plaintiffs' application for a new trial, disregarding, or rather, distorting the finding of the jury, by which, adopting and affirming their answers, they were bound; entered the verdict for the plaintiffs. By this course the courts of appeal were concluded by the findings of the jury in their answers to the questions proposed to them; and while even the House of Lords were excluded from disregarding the findings of the jury, but were bound by them, we think that their decision rests on a complete distortion of the findings of the jury; and that, while independent of those findings, the defendants clearly were liable for conversion, we do not, notwithstanding the ultimate holding in the case in the House of Lords, think it good law, that where parties buy goods only "*as agents in the course of their business as brokers,*" and "*deal with the goods only*"¹ *as agents for their principals,*" that they are liable in trover for conversion; and, notwithstanding the *express* holding of the House of Lords in the case that *they are*, we quite confidently submit, that the whole *ratio decidendi* of the case itself is, that *they are not*. And we submit further that their so expressly holding was the result only of a complete and utterly unjustifiable perversion of the distinct, express finding of the jury in the case. We think the differing opinion of the judges who advised against such holding, the better one; and that the holding of the House of Lords, affirming the judgment of the Queen's Bench "that the defendants in effect *bought as principals*, and would have been liable to B. as vendees, and having dealt with the cotton *as if the property was in them*, by assigning it to M. & Co., they were liable to the plaintiffs for a conversion on its turning out that no property had passed from the plaintiffs to B," while perfectly good law on the facts of the case, independent of the finding of the jury, is utterly inconsistent with the express finding of the jury, that the defendants *did not* buy the cotton "*as principals,*" but bought it "*as agents,*" and "*dealt with the goods only as agents for their principals.*" But for the deliberate holding of the House of Lords (to question which is often, with sycophants, no matter how trans-

¹ See the questions, as stated by Lord appears as we have here quoted it. L. R. 7 Chelmsford, where the word "only" appears. H. L. 793.

parently bad the holding may be, deemed presumption¹), it would seem almost a waste of labor and space to insist upon anything so palpable. And although Lord O'Hagan assented to the holding of his colleagues in the House, he did so (while admitting that they were bound by the findings of the jury) on the ground that the jury did not mean that the defendants in their agency were not acting "only as such," against the express language as we have quoted it from Lord Chelmsford. And we think that the better opinion of Lord O'Hagan was represented by his hesitancy in agreeing with his colleagues, rather than in his agreeing with them. On that point he says: "The real difficulty which embarrasses decision has arisen on the findings of the jury, and the form of the reservation by which, properly understood, *we are bound to abide*. And unquestionably, although that view does not appear to have been pressed in the Court of Queen's Bench, I have felt the force of the objection founded on the findings; *and I have doubted whether some of the judges in the Exchequer Chamber were not right in holding themselves coerced by the verdict to differ from the learned judges of the Queen's Bench, with whose conclusion they would otherwise have concurred.*"²

And it must be borne in mind that the House of Lords, in holding that the defendants, who, according to the finding of the jury, "bought the cotton in question *as agents* in the course of their business as brokers," and "dealt with the goods *ONLY AS AGENTS to their principals*,"³ held that this language did not mean "only as such"⁴ agents, but was open to the construction that they did not buy as agents, but bought as principals; and it is only on the absurdity that parties who "bought only as agents," did not buy "only as such" agents, that the case can be sustained. Notwithstanding such holding, we state the law advisedly, from the case itself, that, as in the facts of the case itself, the defendants bought and dealt with the goods as principals, and were thus liable for a conversion *on those facts*; but, with reference only to the finding of the jury, notwithstanding the manner in which that was distorted, one who buys the goods and deals with them only as an agent, as the jury found the defendants did, is not a principal and is not guilty of a conversion, nor liable in trover, and the case so far as it holds contrary to this is, unquestionably, wrongly decided, according to the decision of the House of Lords in the case itself.⁵

¹ A very emphatic intimation was made in the Privy Council the other day, in the Bishop of Lincoln's Case, as to the right of reversing wrong decisions, whether of the Privy Council or of the House of Lords.

² *Hollins v. Fowler*, L. R. 7 H. L. p. 800.

³ *Ibid.*, at p. 793.

⁴ At p. 800.

⁵ See *Fowler v. Hollins*, L. R. 7 Q. B. 616, at p. 620, where the terms of the leave reserved assumed, in accordance with

Robinson *v.* Mollett¹ is another interesting case, in which a similar conflict took place in the opinions of the judges as characterized Hollins *v.* Fowler.² While, however, we are very strongly of the opinion, as we have shown, that the latter case was finally decided by a complete perversion of plain English, and is, as it was decided, of extremely doubtful authority, Robinson *v.* Mollett, we think, was decided with unquestionable correctness. The case was tried before Bovill, C. J., when a verdict was taken for the plaintiff, subject to leave reserved to enter a nonsuit. In the Common Pleas,³ the judges having equally divided, the verdict was sustained. On appeal, the judges in the Exchequer Chamber⁴ being also equally divided, the judgment of the Common Pleas was affirmed. On appeal to the House of Lords, the judges were

the finding of the jury, that the defendants had "acted throughout honestly, in the ordinary course of business, *having bought and paid for the cotton ONLY AS AGENTS for M., and having dealt with the goods ONLY AS AGENTS to forward them*;" and the question was, under such an assumed state of facts, whether the defendants were answerable for the value of the cotton as having converted it to their own use; "the defendants to be at liberty to argue, if necessary, that the sale by Bayley, under the circumstances, gave a good title to a *bonâ fide* purchaser for value without notice." The rule was moved in the Queen's Bench on three grounds: 1. That the verdict was against the evidence; 2. Misdirection; 3. On the point reserved. *The court refused the rule on the first and second grounds.* As, on principle and authority, the case is not arguable on the ground that B., to whom no property had passed, could, under the circumstances, give a good title to another, the case went to the Exchequer Chamber, and to the House of Lords, hampered with the assumption — the very basis of the leave reserved — that the defendants had "bought and paid for the cotton *only as agents*," and had "dealt with the goods *only as agents to forward them*." And inasmuch as the case, therefore, does on the facts, as governed by the terms of the leave reserved, decide, that one who has bought and paid for goods only as an agent for another, and who has dealt with the goods only as agent to forward them, is liable in trover for conversion; accepting the clear and express reasoning in the case itself on the point, in the House of Lords, we think it is palpable that it is not, as an abstract principle, law, notwithstanding the holding to the contrary in both the Exchequer Chamber and in the House of Lords, — that one who buys and pays for goods *only as an agent for another*,

and who has dealt with them *only as an agent to forward them*, is liable in trover; and we submit that, while the House of Lords nominally decide that he is so liable, they have only reached such a conclusion by such a complete perversion of language as to make the case itself in effect decide, that a person who has dealt with goods as named in the leave reserved, is *not liable* in trover for conversion. We make these additional remarks because the volume of the Law Reports containing the report of the case in the Exchequer Chamber was not at hand when we examined the report of the case as decided by the House of Lords. And we are in the fullest accord with the judgments of Kelly, C. B., and Brett, J. (with whom agreed Byles, J.), and we think their reasoning in the case is unanswerable. We think, on the question which they had to decide, their conclusions, that the defendants were not guilty of a conversion, inasmuch as they acted only as brokers, and exercised no dominion over the cotton in their own right and for their own benefit; and that a possession or detention, which is a mere custody or mere asportation made without reference to the question of the property in chattels, is not a conversion; and that the defendants, acting only as brokers by negotiating a bargain of purchase and sale, and by passing a delivery order, were not guilty of a conversion, — is not only law, but that it is sustained as law by the whole reasoning in the House of Lords, which nominally decided the reverse. See *Ross v. Johnson*, 5 Burr. 2825; *Greenway v. Fisher*, 1 C. & P. 190; *Fouldes v. Willoughby*, 8 M. & W. 540; *Lancashire Waggon Co. v. Fitzhugh*, 6 H. & N. 502.

¹ L. R. 7 H. L. 802.

² *Ibid.* 757.

³ L. R. 5 C. P. 646.

⁴ L. R. 7 C. P. 84.

called in, who were divided in opinion, four against three. The House of Lords unanimously reversed the decision of the courts below. Notwithstanding this wonderful conflict of opinion among the very able judges acting in the case, the correctness of the decision of the House of Lords is, we think, entirely beyond doubt. The facts were that the defendant and appellant, Robinson, a merchant at Liverpool, gave an order to the plaintiffs, tallow-brokers in London, on April 2, for the purchase of fifty tons of tallow at 46s. 6d. On April 29, the defendant gave the plaintiffs another order to purchase 200 tons of tallow, 100 for him, and 100 for a friend; the whole to be booked to him, and the purchase to be made, not at a specified price, but on "the best terms;" the orders being for the June delivery. The plaintiffs had before bought, and afterwards also bought from various persons, considerable quantities of tallow, none specifically for defendant; but proposed to supply the whole 250 tons at the June delivery, out of their various purchases. In their notes, sent immediately after each of the orders had been received, the plaintiffs said: "We have this day bought for your account," and signed them, with the addition of the words, "sworn brokers." The price of tallow fell in the market between the date of the orders and the time for June delivery. When that time arrived, the plaintiffs tendered 250 tons of tallow, but the defendant refused to accept the tallow so tendered. The plaintiffs sold the tallow, and then (suing in their own names, in effect, as though they were principals) brought assumpsit to recover the difference; insisting that they were entitled to do so in virtue of the established usage of the London tallow market. The usage relied on did not exist in Liverpool, and was unknown to the defendant. The question in the case was, whether the appellant was bound by the custom merely by the employment of the respondents as his brokers to buy for him, and from their having purchased in the London market the quantity of tallow ordered. The House of Lords held that he was not. Lord Chelmsford, in his judgment in the House of Lords, which was concurred in by his able colleagues, deals conclusively with the case. The following brief passages in his judgment go to the very gist of the matter: "The effect of this custom is to change the character of a broker who is an agent to buy for his employer, into that of a principal to sell for him. No doubt a person employing a broker may engage his services upon any terms he pleases; and if a person employs a broker to transact for him upon a market with the usages of which the principal is unacquainted, he gives authority to the broker to make contracts upon the footing of such usages, provided they are such as regulate the

mode of performing the contracts, and *do not change their intrinsic character*. . . . I have already intimated the doubt which I entertain whether the usage of the London tallow trade applies at all to the case of an ordinary transaction between broker and principal. Assuming, however, that it does, I hesitate to say that it would not apply in the case of persons knowing of its existence, and employing a broker to act for them in the market where it prevails. But the usage is of such a peculiar character, and *is so completely at variance between the parties, converting a broker employed to buy, into a principal selling for himself*, and thereby giving him an interest wholly opposed to his duty, that I think no person who is ignorant of such an usage can be held to have agreed to submit to its conditions, merely by employing the services of a broker, to whom the usage is unknown, to perform the ordinary and accustomed duties belonging to such employment.”¹ The principle on which the case was decided by the House of Lords was virtually conceded by all the judges, so many of whom, in this most extreme case, failed to make a proper application to it. Thus: “It is an elementary proposition that a custom of trade may control the mode of performance of a contract, *but cannot change its intrinsic character*.”² And, per Blackburn, J.: “If the terms are such *as to be inconsistent with the nature of the employment, so that if they prevailed they would change its nature altogether*, I think they should be rejected.”³ It was on the clearest application of these principles that the House of Lords reversed the decision of the courts below.⁴

¹ L. R. 7 H. L. at p. 836 *et seq.*

² *Per Willes, J., Ibid.*, at p. 818.

³ *Ibid.*, at p. 819.

⁴ The principle governing this case is well laid down by Coleridge, J., in *Brown v. Byrne*, 3 El. & B. 703, 715, thus: “Mercantile contracts are very commonly framed in a language peculiar to merchants; the intention of the parties, though perfectly well known to themselves, would often be defeated if this language were strictly construed according to its ordinary import in the world at large; evidence, therefore, of mercantile custom and usage is admitted in order to expound it and arrive at its true meaning. Again, in all contracts, as to the subject-matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included however, as of course, by mutual understanding; evidence therefore of such incidents is receivable. The contract, in

truth, is partly express and in writing; partly implied or understood, and unwritten. But, in these cases, a restriction is established on the soundest principle, that the evidence received *must not be of a particular which is repugnant to, or inconsistent with, the written contract*. Merely that it varies the apparent contract is not enough to exclude the evidence; for it is impossible to add any material incident to the written terms of a contract without altering its effect, more or less. Neither, in the construction of a contract among merchants, tradesmen, or others, will the evidence be excluded because the words are in their ordinary meaning unambiguous; for the principle of admission is, that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. What words more plain than ‘a thousand,’ ‘a week,’ ‘a day’? Yet the cases are familiar in which ‘a thousand’ has been held to mean twelve hundred; ‘a week,’ a week only during the theatrical season; ‘a day,’ a working day. In such cases the

Armstrong v. Stokes,¹ in the Queen's Bench, decides that a vendor, who has given credit to an agent, believing him to be the principal, cannot recover against the undisclosed principal, if the principal has *bonâ fide* paid the agent at a time when the vendor still gave credit to the agent, and knew of no one else as principal.

In this case, R. & Co. were commission merchants, acting sometimes for themselves and sometimes as agents. The plaintiff, a merchant, had had dealings with them, and had never inquired

evidence neither adds to, nor qualifies nor contradicts the written contract; it only ascertainment it, by expounding the language." See *Webb v. Plummer*, 2 B. & Ald. 746; *Hutton v. Warren*, 1 M. & W. 466; *Smith v. Wilson*, 3 B. & Ad. 723; *Grant v. Maddox*, 15 M. & W. 737; *Cochran v. Retberg*, 5 Esp. 121; *Trueman v. Loder*, 11 A. & E. 598; *Anderson v. Pitcher*, 2 B. & P. 164, 168; *Spartati v. Benecke*, 10 C. B. 212; *Syers v. Jonas*, 2 Ex. 116; *Wigglesworth v. Dallison*, 1 Doug. 201; *Ford v. Yates*, 2 M. & G. 549; *Blackett v. Royal Ex. Ass. Co.*, 2 C. & J. 244, 249. In *Trueman v. Loder*, 11 A. & E. 559, Lord Denman says: "Evidence of the prevailing custom is supposed to show that both parties had in their contemplation more than appears in the writing; but supposing them both to have not only contemplated, but distinctly expressed, in the plainest words, that they considered their contract to include a provision not to be found in the paper, still the evidence cannot be introduced into the cause. Custom of trade has been supposed to form a virtual exception to this well-known rule; but the cases go no farther than to permit the explanation of words used in a sense different from their ordinary meaning, or the addition of known terms *not inconsistent with the written contract*." The law is laid down to the same effect by Parke, B., in *Hutton v. Warren*, 1 M. & W. 466, 475: "It has long been settled that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express the whole of the contract by which they intended to be bound, but a contract with reference to those known usages. . . . Accordingly, in *Wigglesworth v. Dallison*, 1 Doug. 201, afterwards affirmed in a writ of error, the tenant was allowed an away-going crop, though there was a formal lease under

seal. There the lease was entirely silent on the subject of such a right, and Lord Mansfield said, that the custom did not alter or contradict the lease, but only superadded something to it. This question subsequently came under the consideration of the Court of King's Bench, in the case of *Senior v. Armitage*, Holt, 197. In that case, which was an action by a tenant against his landlord for a compensation for seed and labor under the denomination of tenant-right, Mr. Justice Bayley, on its appearing that there was a written agreement between the parties, nonsuited the plaintiff. The court afterwards set aside the nonsuit, and held, as appears by a manuscript note of that learned judge, that, though there was a written contract between landlord and tenant, the custom of the country would be still binding, *if not inconsistent with the terms of such written contract*; and that not only all common-law obligations, but those imposed by custom, were in full force where the contract did not vary them." See further, *Sweeting v. Pearce*, 7 C. B. n. s. 449; *Lamplugh v. Braithwait*, 110b. 105; *Sutton v. Tatham*, 10 A. & E. 27; *Taylor v. Stray*, 2 C. B. n. s. 175, 197; *Rosewarne v. Billing*, 15 C. B. n. s. 316; *Bayliffe v. Butterworth*, 1 Ex. 425; *Greaves v. Legg*, 11 Ex. 642; 2 H. & N. 210; *Humphrey v. Dale*, 7 E. & B. 266; E. B. & E. 1004; *Wall v. Cockerell*, 10 H. L. C. 229; *Fawkes v. Lamb*, 31 L. J. Q. B. 98; *Hall v. Janson*, 4 E. & B. 500; *Salomons v. Pender*, 3 H. & C. 639; *Bosstick v. Jardine*, *ib.* 700; *Sharman v. Brandt*, L. R. 6 Q. B. 720; *Stulley v. Dickey*, 5 Binn. 287; *Barber v. Bruce*, 3 Conn. 9; *Bank of Columbia v. Fitzhugh*, 1 Hurr. & G. 239; *Haven v. Wentworth*, 2 N. H. 93; *United States v. Arredondo*, 6 Pet. 715; *Simpson v. Gazzam*, 6 Port. 123; *The Reeside*, 2 Sumn. 569; *Cooper v. Kane*, 19 Wend. 386; *Shaw v. Mitchell*, 2 Mete. 65; *Eaton v. Smith*, 20 Pick. 250; *Wayne v. Steamboat General Pike*, 16 Ohio, 421; *Inglebright v. Hammond*, 19 Ohio, 337; *Foye v. Leighton*, 2 Fost. 71. See further, in a later volume of this work, on Custom and Usage.

¹ L. R. 7 Q. B. 598.

whether they had principals or not, and had always settled with them. On June 15, plaintiff contracted to sell to R. & Co., 200 pieces of shirtings at a certain price, payment to be made in thirty days after delivery, with a discount of $1\frac{1}{2}$ per cent. Plaintiff delivered the shirtings (which were gray or unbleached shirtings), and the payment ought to have been made on Friday, Aug. 25. On the 24th, R. & Co. asked for delay till the next pay-day, Sept. 1; and whilst plaintiff was considering what to do, R. & Co., on Aug. 30, stopped payment. It turned out that R. & Co. had bought the goods for defendants, under the following circumstances: Defendants, merchants, had been in the habit of giving orders to R. & Co., for white and gray shirtings. When white were ordered, R. & Co. went into the market, bought gray shirting, had them bleached, and charged defendants with the price of the gray shirtings and one per cent. on the aggregate as their commission, with the charges of packing, etc. In previous transactions, defendants had always paid R. & Co., generally in cash, *i. e.*, on the next weekly pay-day, and had never been brought into communication with those who supplied or those who bleached the goods. In the present case, defendants gave a verbal order for 200 pieces of white shirtings, the price not being named nor the mode of payment. R. & Co. having received the gray shirtings from plaintiff, got them bleached and sent them to defendants, charging the price at which they had bought of plaintiff, — the cost of bleaching and one per cent. on the aggregate of those two sums, with the charges of packing, etc., and defendants, with perfect good faith, paid R. & Co. on the next pay-day after they received them, *viz.*, on Aug. 11. On the above facts, the court, having power to draw inferences, held that the delay of plaintiff in taking no steps between the 25th and the 30th of August was not *laches* such as would have precluded him, if otherwise entitled, from recovering payment from defendants; but that, — assuming that there was authority from the course of dealing between defendants and R. & Co., to establish privity of contract between defendants and those from whom R. & Co. obtained the goods, — after the *bonâ fide* payment by defendants to R. & Co., at a time when plaintiff still gave sole credit to R. & Co., and knew of no one else as principal, plaintiff could not recover the price from defendants.¹

¹ This case was decided on the principle laid down in *Thompson v. Davenport*, 9 B. & C. 86, by Bayley, J.: "Where a purchase is made by an agent, the agent does not of necessity so contract as to make himself personally liable; but he may do so. If he does make himself per-

sonally liable, it does not follow that the principal may not be liable also, subject to this qualification, that the principal shall not be prejudiced by being made personally liable if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or if

In a very recent case (A. D. 1887) the effect of usage in making brokers personally liable, where they contracted as brokers,

the state of the accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment or such a state of accounts would be an answer to the action brought by the seller where he had looked to the responsibility of the agent." See *Smethurst v. Mitchell*, 1 E. & E. 622; *Ex parte White*, L. R. 6 Ch. App. 397; *Bostock v. Jarline*, 3 H. & C. 700; *Horsfall v. Fauntleroy*, 10 B. & C. 755; *Mollett v. Robinson*, L. R. 7 C. P. 119; *Railton v. Hodgson*, and *Peele v. Hodgson*, 4 Taunt. 575, 577, n.; *Waring v. Favenck*, 1 Camp. 85; *Kymer v. Suwercroft*, 1 Camp. 109; *Kemble v. Atkins*, Holt, 427; *Higgins v. Senior*, 3 M. & W. 844; *Smyth v. Anderson*, 7 C. B. 39. See *Curtis v. Williamson*, L. R. 10 Q. B. 57, stated *ante*, p. 548, and *Id.* note 2. In *Smyth v. Anderson*, 7 C. B. 39, Wilde, C. J., told the jury "that if a merchant sells goods to another in ignorance that he buys as an agent, or knowing that he is an agent, being uninformed as to the name of his principal, although the seller may in the first instance have adopted the actual buyer, yet when he discovers for whom the goods were bought he is at liberty to adopt the principal as his debtor, and charge him, — that is, provided the principal has not in the interim paid his agent. The seller cannot upon discovering the true character of the transaction charge the principal, to whom he did not give credit in the first instance, to the prejudice of the principal, with reference to the state of accounts between him and his agent." This charge was sustained by the court. But in *Heald v. Kenworthy*, 10 Ex. 739, it was held that where a principal authorizes his agent to pledge his credit, and the latter makes a purchase on his behalf, and thereby creates a debt, the principal is not discharged by payment to the agent, if the money is not paid over to the seller, unless the latter by his conduct makes it unjust that the principal should be sued; as, for example, where the seller by his words or conduct induces the principal to believe that a settlement has been come to between the seller and the agent, in consequence of which the principal pays the amount of the debt to the agent. In *Armstrong v. Stokes*, L. R. 7 Q. B. 603, Blackburn, J., says: "The first point depends on a question of fact, viz., what was the authority really given to J. and O. Ryder [the alleged agents] by the defendants? It is, we think, too firmly established to be now questioned that where a person employs

another to make a contract of purchase for him he, as principal, is liable to the seller, though the seller never heard of his existence, and entered into the contract solely on the credit of the person whom he believed to be the principal, though in fact he was not. *It has often been doubted whether it was originally right so to hold* [see our remarks on this in discussing the non-liability of a foreign principal. *Ante*, p. 515, n.]; but doubts of this kind come now too late; for we think that it is established law that if on the failure of the person with whom alone the vendor believed himself to be contracting, the vendor discovers that in reality there is an undisclosed principal behind, he is entitled to take advantage of this unexpected godsend, and is not put to take a dividend from the estate of him with whom alone he believed himself to be contracting, and to whom alone he gave credit, and to leave the trustees of that estate to settle with the undisclosed principal, subject to all mutual credits and equities between them. He may recover the price himself direct from the principal, subject to an exception, which is not so well established as the rule, and is not very accurately defined, viz., that nothing has occurred to make it unjust that the undisclosed principal should be called upon to make the payment to the vendor." This is very unsatisfactory, and shows the absence of any sound and intelligible principle governing the cases which establish either the rule or the exception. Blackburn, J., then discusses the question as to whether there was any privity of contract between the plaintiff and defendant, and incidentally mentions the case of a foreign principal and a home agent, in order to show that there may be a case where an undisclosed principal is not liable, on discovery, to the vendor for the purchases by the agent. The illustration, however, from that point of view we do not consider a good one. We have already considered that question [see *ante*, 507 *et seq.*], and think that the distinction taken, as a matter of law, is not well founded. In this country the different States in all analogous cases are treated as foreign to each other, and yet, we apprehend, the existence of such a rule, as applicable to the different States, has never been so much as mooted. And in England, too, in the important case of *Smyth v. Anderson*, 7 C. B. 21, the purchaser of the goods was a merchant residing abroad, and he was only held not liable for the goods because, having bought the goods through

was considered and decided. An action was brought against the defendants, who were hop-brokers, to recover damages for the

an agent, he in good faith had paid his agent through whom the transaction was carried out, without any demand having been in the mean time made upon him for payment by the vendors, or notice by them that they looked to him for payment. We think the *rationale* of *Smyth v. Anderson* justifies that which *Bigelow, C. J.*, implied when he said in *Bray v. Kettell*, 1 Allen, 80, 83, and with which we fully concur, that no case had held that the foreign principal was not as liable as the home principal on the contract made by his agent. We think the true principle governing the cases, as *Smyth v. Anderson* and *Armstrong v. Stokes* in effect show, is quite as applicable in the one case as in the other. And we think, too, that the principle decided in both of these cases is correct, and is applicable to such questions between principals, and between principal and agent generally, with no more limitation in principle to a foreign purchaser than to a home purchaser. We think that principle is well and accurately stated by *Bayley, J.*, in *Thompson v. Davenport*, 9 B. & C. 86, as quoted in this note, and by *Lord Tenterden* in the same case, as follows: "I take it to be a general rule that if a person sells goods, supposing that at the time of the contract he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the mean time have debited the agent with it, he may afterwards recover the amount from the real principal, subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal." Or, as is even more clearly stated by *Bayley, J.*, as we have quoted, "*If the principal has paid the agent, or if the state of the accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment or such a state of accounts would be an answer to the action brought by the seller where he had looked to the responsibility of the agent.*" This, we think, is law; but there have been *dicta* which, if applied to such cases as those we have been considering, are very far otherwise. Thus in *Kymer v. Suwereropp*, 1 Camp. 109, 112, *Lord Ellenborough* says: "A person selling goods is not confined to the credit of a broker who buys them, but may resort to the principal on whose account they are bought; and he is no more affected by the state of accounts

between the two than I should be were I to deliver goods to a man's servant *pursuant to his order*, by the consideration of whether the servant was indebted to the master or the master to the servant. If he lets the day of payment go by he may lead the principal into a supposition that he relies solely on the broker; and if in that case the price of the goods has been paid to the broker, on account of this deception the principal shall be discharged." In this case the brokers bought the goods in their own name, to whom also the warrants for the delivery of the goods were given, on which the goods were obtained from the warehouse, the defendant not being known in the matter by the vendors, and he having accepted the brokers' bill for the goods on receiving them. Obviously this is a very different case from that assumed by *Lord Ellenborough* of delivering "goods to a man's servant *pursuant to his order.*" Then the agent in this case was not a factor or commission merchant, but a broker, with reference to whom a distinction is made in some of the cases. See *Kemble v. Atkins*, *Holt N. P.* 427; *Higgins v. Senior*, 8 M. & W. at p. 844. There is also the case of *Heald v. Kenworthy*, 10 Ex. 739, containing expressions by *Parke, B.*, which are concurred in by *Pollock, C. B.*, and *Alderson, B.*, which, disconnected from their context, are liable to be misunderstood. See *Armstrong v. Stokes*, L. R. 7 Q. B. at p. 609, stated *infra*. The case of *Heald v. Kenworthy* came up on a demurrer to a very badly framed plea, which, while admitting the purchase of the goods *by the agent from the plaintiffs on behalf of the defendant*, alleged that the sale was made to the agent on the agent's own credit, and that the defendant had paid the agent. There was probably sufficient in the plea to justify the court holding as they did, that *where a principal authorizes his agent to pledge his credit, and the latter makes a purchase on his behalf*, and thereby creates a debt (that is, by the principal to the seller), the principal is not discharged by payment to the agent if the money is not paid over to the seller, unless the latter by his conduct makes it unjust that the principal should be sued; as, for example, where the seller by his words or conduct induces the principal to believe that a settlement has been come to between the seller and the agent, in consequence of which the principal pays the amount of the debt to the agent. The whole case proceeds on the ground that the plea admits that the goods were purchased on

non-delivery of hops equal to sample, sold under a written contract in the following terms: "Sold by O. & T. [the defendants]

the credit of the principal. Thus Martin, B.: "*Here the defendant authorized his agent to pledge his credit.*" The case differs from that where a servant is sent with the money in his hand to make a purchase, *for there the master gives no authority to his servant to pledge his credit.*" So, Pollock, C. B.: "*A person employs his agent to purchase goods for him, with authority to pledge his credit. The agent does so, and thus creates a debt; and I agree with the remark made by my brother Parke that all the cases in which the principal has been held to be discharged are cases in which the seller has enabled the agent to misrepresent, or where the agent by some conduct adopted by the seller has placed his principal in a worse situation than that he ought to be in.*" Parke and Alderson, BB., are to the same effect. This is very far from sustaining the very general language of Lord Ellenborough in *Kymer v. Sawerdropp*, 1 Camp. 109; treating the word "broker" as synonymous with agent or factor. In a note (Addenda, p. 180, c., pl. 8) to 1 Camp. we find the following: "In *Kymer v. Sawerdropp* a rule for a new trial was discharged on the ground that the defendant had not properly substantiated the fact that *he had paid the broker for the coffee delivered to him.*" This, of course, of itself greatly weakens the force of Lord Ellenborough's mere *nisi prius* ruling.

What was said in *Heald v. Kenworthy*, 10 Ex. 739, was based on the fact that the principal had authorized the pledge of his (the principal's) credit, by the agent. This is evident, not only by what we have quoted, but by the case of the foreign principal, put by Parke, B.: "Where the seller deals with an agent resident in this country, and acting for a foreign principal, the presumption is, that the seller does not contract with the foreigner and trust him, but with the party with whom he makes the bargain. That is a question of fact and not of law." We think that here we find a basis on which the whole doctrine can rest; thus, where the principal has authorized the agent to pledge the principal's credit in the purchase of goods, "if the conduct of the seller would make it unjust for him to call upon the buyer for the money; as, for example, where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and seller have come to a settlement on the matter; or if any representation to that effect is made by the seller either by words or conduct, the seller cannot afterwards

throw off the mask and sue the principal. It would be unjust for him to do so." *Per Parke, B., in Heald v. Kenworthy*, 10 Ex. at p. 746. "But I think," continues Parke, B., "that there is no case of *this kind* where the plaintiff has been precluded from recovering, unless he has in some way contributed either to deceive the defendant or to induce him to alter his position." But, on the other hand, whether the principal is a foreign resident, as in *Smyth v. Anderson*, 7 C. B. 21; or a home resident, as in *Armstrong v. Stokes*, L. R. 7 Q. B. 598, and the principal has not authorized the agent to pledge the principal's credit, and the credit has been given by the seller to the agent (the principal not being disclosed), and by the agent to his principal: there, if it be sought to bind the principal, on his discovery, we think the language of Lord Tenterden and Bayley, J., in *Thomson v. Davenport*, 9 B. & C. 86, is applicable. Thus, by the former: "I take it to be a general rule, that if a person sells goods supposing that at the time of the contract he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the mean time have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal." And by Bayley, J.: "Where a purchase is made by an agent, the agent does not of necessity so contract as to make himself personally liable; but he may do so. If he does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification, that the principal shall not be prejudiced by being made personally liable, if the justice of the case is that he should not be personally liable. If the principal *has paid the agent*, or if the state of the accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts, would be an answer to the action brought by the seller where he had looked to the responsibility of the agent."

We think this fully sustains the distinction we have taken, and that it is sustained, in principle, not only by the well-decided cases of *Smyth v. Anderson*, 7 C. B. 21, and *Armstrong v. Stokes*, L. R. 7 Q. B. 598; but, keeping in view the

to P. S. & Co. [the plaintiffs], for and on account of owner, 100 bales hops," etc., signed by the defendants, "O. & T." At the

distinction we have made, by all the well-decided cases on the question in England or in this country. We think that that very able English judge, Blackburn, J., scarcely does justice to Pollock, C. B., and Parke and Alderson, BB., in the views which they expressed in *Heald v. Kenworthy*, 10 Ex. 739, 745. As we have shown by the extracts we have made, they, in deciding on the demurrer in the case, treated it as a case where the principal had authorized the pledge of his credit. Thus, in a few words, Alderson, B., dealing with that question, says: "It is clear that the defendant, who is principal in the transaction, *authorized the agent to contract the debt on his account*; the defendant afterwards paid his agent money, which, however, he did not pay over to the plaintiffs. Now the defendant is not excused from seeing that the plaintiffs are paid, unless the latter by their acts induced the defendant to make the payment to their agent. Where the seller trusts the agent only, and says that he will consider him as the only party liable, the agent alone is responsible, and the seller cannot proceed against the principal. But there must be some act on the part of the creditor to warrant us in saying *that the payment by the debtor to his agent is to be treated as a payment to the creditor*. Where a creditor by his conduct induces the debtor to pay a third party, and thereby alters his debtor's position, it would be unjust to call upon the debtor to pay the amount of the debt to his creditor."

This is a very different case from that where the credit has been given by the seller to the agent, and the principal, dealing alone with the agent, as a principal or *quasi* principal, makes payments to the *quasi* principal in good faith. There, if the seller seek to bind the principal, it would clearly be most "unjust" to do so, "if the principal has paid the agent," or if the state of the accounts between them would otherwise render it inequitable for him to do so. Such a state of facts existed in *Smyth v. Anderson*, 7 C. B. 21, and in *Armstrong v. Stokes*, L. R. 7 Q. B. 598, where they were dealt with, and, we think most wisely, in accordance with the views we have herein expressed. With the exception of what we think to be a misapprehension by Blackburn, J., of the decision in *Heald v. Kenworthy*, 10 Ex. 739 (and which misapprehension we think, by the above statement and extracts, we make clear), and of which case, owing to such misimpression, he evidently disapproves, we entirely concur with the

following, which, like the case of *Smyth v. Anderson*, 7 C. B. 21, sustains the distinction we have taken. Blackburn, J., says: "Parke, B., lays down generally that 'if a person orders an agent to make a purchase for him, he is bound to see that the agent pays the debt; and the giving the agent money for that purpose does not amount to payment unless the agent pays it accordingly.' After commenting on several of the cases already referred to, he concludes: 'I think that there is no authority for saying that a payment made to the agent precludes the seller from recovering from the principal, unless it appears that he has induced the principal to believe that a settlement has been made with the agent.' He states this as generally true wherever a principal has allowed himself to be made a party to a contract, and makes no exception as to the case where the other side made the contract with the agent believing him to be the principal, and continued in such belief till after the payment was made. [Here is an intimation of the exact distinction which, as we have pointed out, should be made.] He certainly does not in terms say that there is no qualification of the principle he lays down when applicable to such a case; but — recollect how careful Parke, B., always was to lay down what he thought to be the law fully and with accuracy — we think the counsel for the plaintiff were justified in arguing that Parke, B., thought the exception did not exist. And this is, in our opinion, a weighty authority in favor of the plaintiff's contention, more especially as Pollock, C. B., assents in his judgment to the remark thrown out by Parke, B., during the argument, and afterwards more elaborately stated by him in his judgment. And Alderson, B., in his judgment, appears entirely to assent to the judgment of Parke, B. We think that we could not, without straining the evidence, hold in this case that the plaintiff [*i. e.*, the seller] had induced the defendants [the principals] to believe that he [the plaintiff] had settled with J. & O. Ryder [the agents] at the time when the defendants paid them. *This makes it necessary to determine whether we agree in what we think was the opinion of Parke, B., acquiesced in by Pollock, C. B., and Alderson, B.* We think that, if the rigid rule thus laid down were to be applied to those who were only discovered to be principals after they had fairly paid the price to those whom the vendor believed to be the principals, and to whom alone the vendor

trial, the plaintiffs contended that the defendants were personally liable on the contract, and evidence was admitted to show that,

gave credit, it would produce intolerable hardship. It may be said, perhaps truly, this is the consequence of that which might originally have been a mistake in allowing the vendor to have recourse at all against one to whom he never gave credit [See our agreement with this in our comments as to the mistaken basis on which the non-liability of a foreign principal has been put. *Ante*, pp. 515, 516, n.], and that we ought not to establish an illogical exception in order to cure a fault in a rule. But we find an exception (more or less extensively expressed) always mentioned in the very cases that lay down the rule; and without deciding anything as to the case of a broker who avowedly acts for a principal (though not necessarily named), and confining ourselves to the present case, which is one in which, to borrow Lord Tenterden's phrase in *Thomson v. Davenport*, 9 B. & C., at p. 86, the plaintiff sold the goods to Ryder & Co., 'supposing at the time of the contract he was dealing with a principal,' we think that such an exception is established. We wish to be understood as expressing no opinion as to what would have been the effect of the state of the accounts between the parties if J. & O. Ryder had been indebted to the defendants on a separate account, so as to give rise to a set-off or mutual credit between them. We confine our decision to the case where the defendants, after the contract was made, and in consequence of it, *bonâ fide*, and without moral blame, paid J. & O. Ryder at a time when the plaintiff still gave credit to J. & O. Ryder, and knew of no one else. We think that after that it was too late for the plaintiff to come upon the defendants."

While fully concurring with the general reasoning of Blackburn, J. (one, we think, of the very ablest judges which England has produced), and with the decisions in *Smyth v. Anderson* and *Armstrong v. Stokes*, which, we think, establish the law as we have herein stated it, and which, we think, is not affected, as we have shown, by the language, properly understood and applied, used by Pollock, C. B., and Parke and Alderson, BB., in *Heald v. Kenworthy*, yet we think the principle, as we have stated it, and as it accords with the actual *ratio decidendi* of *Smyth v. Anderson* and *Armstrong v. Stokes*, rendered unnecessary the hesitation by Blackburn, J., as to the effect of the rule and decision in *Armstrong v. Stokes*, where the question arises in connection with "a set-off or mutual credit"

between the principal and the agent; or, as we think we have more properly designated him, the intermediate or *quasi* principal. Where the credit has not been given to the party for whom the goods are intended (generally, but not with strict accuracy, called "the principal"), but has been given to the actual purchaser (who, in a sense, is called the "agent"), and the "agent" has not paid for the goods, the liability of the "principal" to pay for the goods (although in principle unsound, where, for instance, the credit has been given by the seller to the agent, and by the agent to the ultimate purchaser, the "principal"), is put upon the ground that it would be an injustice for the seller not to get his payment, if by doing so from the ultimate purchaser or "principal" the latter would thereby be put to no loss, or suffer no injustice. Thus, in *Thomson v. Davenport*, 9 B. & C., at p. 89, Bayley, J., says "It is said that the seller ought to have asked the name of the principal, and charged him with the price of the goods. By omitting to do so, he might have lost his right to claim payment from the principal, *had the latter paid the agent*, or *had the state of the accounts between the principal and the agent been such as to make it unjust that the former should be called upon to make the payment*. But in a case circumstanced as this case is, where it does not appear but that the man who has had the goods has not paid for them, what is the justice of the case? That he should pay for them to the seller or to the solvent agent, or to the estate of the insolvent agent, who has made no payment in respect of the goods? The *justice of the case* is, as it seems to me, all on one side, namely, that the seller shall be paid, and that the buyer [the principal] shall be the person to pay him, provided he has not paid anybody else. Now, upon the evidence it appears that the defendant had the goods, and has not paid for them, either to McKune [the agent] or to the plaintiffs, or to anybody else. He will be liable to pay for them either to the plaintiffs or to McKune's estate. The justice of the case, as it seems to me, is, that he should pay the plaintiffs, who were the sellers, and not any other person." Here the liability of the ultimate purchaser (the "principal") is put upon the ground that, as it would be immaterial to him whom he paid, the "justice of the case" (that is the way the law was made) would require that he should pay the seller, if by doing so he would himself suffer no injustice aris-

by the custom of the hop trade in such a contract, if the principal be not disclosed at the time of making the contract, the broker is

ing either out of his having paid the agent, or from the state of the accounts between them. This rule, founded simply on the view of abstract justice, would apply, as it is in effect put, to "a set-off or mutual credit" between the principal and agent, as it would to a payment by the principal to his agent. We think the matter might be well illustrated thus: A merchant in Boston writes to a dealer in New York to ship him 1000 pieces of gray cottons. The New York dealer had previously bought on credit 10,000 pieces of a manufacturer, and out of these he ships the Boston merchant the 1000 pieces ordered, at a price satisfactory to the Boston merchant. The New York dealer fails, leaving the manufacturer unpaid. Obviously there would be no liability of the Boston merchant to the manufacturer, for there would be no ground whatever for claiming that there was any privity between them; the two transactions being entirely different and independent of each other. But, next: the Boston merchant writes the New York dealer, or commission merchant, or factor, to ship him 1000 pieces of gray cotton, and the New York dealer goes to a manufacturer and buys the specific 1000 pieces, on his own credit, and ships them to the Boston merchant. The cases such as *Thomson v. Davenport*, 9 B. & C. 78; *Moore v. Clementson*, 2 Camp. 22; *Paterson v. Gandasequi*, 15 East, 62; *Railton v. Hodgson*, cited in *Paterson v. Gandasequi*, 15 East, 67, — hold, that here the Boston merchant is liable, as an undisclosed principal, to the manufacturer, for the purchase by "the agent."

We think the principle of these cases (more than doubted by Blackburn, J. in *Armstrong v. Stokes*), is unsound; and that where A. gives no authority to B. to pledge his credit to C., and C. gives credit to B., and B. to A., there is no privity of contract between A. and C.; and, therefore, on the failure of B. to pay C., there is no indebtedness by A. to C.; and the cases which hold otherwise are no sounder law than were the cases which held for a hundred years, that parties who participate in the profits are necessarily partners, until the fallacy of the position was shown, and the law reversed, in *Cox v. Hickman*, 8 H. L. C. 268.

But, assuming that the law is, as so many cases state it to be, then, we think, it is still clear, that where the ultimate purchaser or principal is held liable to the original seller, "justice" requires that he shall be only so liable by not being "prejudiced by being made personally lia-

ble," where either "the principal has paid the agent," or, where, as in the case of a "set-off for mutual credit between them [using the language of Blackburn, J., in *Armstrong v. Stokes*], the state of the accounts between the agent here and the principal would make it unjust that the seller should call on the principal;" and that, in either of such cases, "the fact of payment, or such a state of accounts, would be an answer to the action brought by the seller where he has looked to the responsibility of the agent." *Per* Bayley, J., in *Thomson v. Davenport*, 9 B. & Co., at p. 88. This, in effect, was admitted in *Moore v. Clementson*, 2 Camp. 22, by the plaintiff's counsel, Park, who "allowed, that if the defendants were neither expressly told, nor had reason to believe, that in this action Green acted only as an agent, *they were entitled to the set-off which they claimed.*" But he claimed that, an express notice of the plaintiff being the owner of the goods having been given to the defendant, the right of set-off between the principal and agent did not attach. Lord Ellenborough, in that case, too, had a qualification of the right of set-off with a too-confined limitation, which may have helped to establish a wrong rule. See also, *Coates v. Lewes*, 1 Camp. 444.

On further research we find that the very principle for which we have contended in this note, but which later cases, from the *nisi prius* case of *Kymer v. Suwercroft*, 1 Camp. 110 (in which Lord Ellenborough used the language we have quoted from him) down, have tended to confuse, was, in effect, well-established, as regards the right of set-off, over a hundred years ago. Thus, in *Rabone Jun. v. Williams*, at the sittings after Michaelmas, 1785, cited in a note to *George v. Clagett*, 7 T. R. 360, which was an action for the value of goods sold to the defendant by means of the house of *Rabone Sen. & Co.*, factors to the plaintiff; the defendant, the vendee of the goods, set off a debt due to him from *Rabone & Co.*, the factors, upon another account, alleging that the plaintiff had not appeared at all in the transaction, and that credit had been given by *Rabone & Co.*, the factors, and not by the plaintiff. Lord Mansfield, C. J.: "Where a factor dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and though the real principal may appear and bring an action upon that contract against the pur-

in fact regarded as the principal, and is held liable. It was admitted that the plaintiffs had not asked the defendants for the

chaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has long been settled." In *Bayley v. Morley*, London Sittings, after Mich. 1788, Lord Kenyon recognized the law of this case.

The same point was also ruled by Lord Kenyon in *Stacey, Ross, and others v. Deey*, London Sittings after Mich. 1789, in assumpsit for goods sold, where a set-off was pleaded. The plaintiffs jointly carried on trade as grocers, but Ross was the only ostensible person engaged in the business, and appeared to the world as solely interested therein. By the terms of the partnership, Ross was to be the apparent trader, and the others were to remain mere sleeping partners. The defendant was a policy broker, and being indebted for groceries to Ross, as he conceived, he effected insurances and paid premiums on account of Ross solely, to the amount of his debt, under the idea that one demand might be set off against the other. Ross's affairs being much deranged, payment of the money due from the defendant was demanded by the firm, and was refused by him, upon the ground of his having been deceived by the other partners keeping back and holding out Ross as the only person concerned in the trade. Lord Kenyon, C. J., was of opinion that, as the defendant had a good defence by way of set-off as against Ross, and had been by the conduct of the plaintiffs led to believe that Ross was the only person he contracted with, they could not now pull off the mask and claim payment of debts supposed to be due to Ross alone, without allowing the parties the same advantages and equities in their defence that they would have had in an action brought by Ross. The same principle is sustained (A. D. 1797), in *George v. Clagett*, 7 T. R. 359, where, on principle, as well as on the authority of *Rabone v. Williams* (*supra*), it was held by Lord Kenyon, affirmed by the full court, that where goods had been bought from a factor, the "principal," or purchaser, had the right of setting off any claim for set-off, as between him and the factor, in an action by the seller against the purchaser for the price of the goods. These cases, coupled with the principles established by *Smyth v. Anderson*, 7 C. B. 21, and *Armstrong v. Stokes*, L. R. 7 Q. B. 593, thoroughly sustain the rule and its qualification as stated by us in this note. In *Serimshire v. Alderton* (A. D. 1743), the purchaser from a factor was notified by

the seller not to pay for the goods; but he did so, notwithstanding. The chief justice (Sir Wm. Lee) was of opinion that there was a remedy of the seller against the buyer, provided there was no payment to the factor. But the jury found otherwise, and persisted in their verdict. On a second trial, before a special jury, the chief justice declared that a factor's sale does by the general rule of law create a contract between the owner and the buyer. But the jury again found for the defendant, and on being asked their reason, put it on precisely the same ground that we have done, namely, that where the seller gives the credit to the factor, and the factor gives the credit to the ultimate purchaser, there is no contract between the original seller and the ultimate purchaser, or, as they thought, "no credit was given as between the owner and buyer, and that the latter was answerable to the factor only, and he only to the owner." In such a case as we have put, we shall be surprised if such a doctrine does not become well established. The *visi prius* case of *Moore v. Clementson*, 2 Camp. 22, *per* Lord Ellenborough, we do not consider well decided, and we doubt very much if the decision would have been affirmed by the full court, any more than that other doubtful decision of the same learned judge (*Kymer v. Suwercroft*, 1 Camp. 109; 180 c.), seems to have been. In *Moore v. Clementson*, where the defendants claimed a set-off as between them and the factor, Lord Ellenborough held, correctly we think, in accordance with the view expressed in this note, that if the defendants had only knowledge of the seller to them being a factor, that would not, as between them and the original sellers, deprive them of their right of set-off; but the fact that, the purchase having been duly made and the set-off having existed, the defendants having casually ascertained from the factor's clerk, "after a considerable portion of the goods had been previously delivered" by the factor to the purchaser, this deprived the purchasers of their right to the set-off. We think that their right to a set-off by a knowledge so gained at such a stage of the proceedings, was not affected at all, or, at the very utmost, on Lord Ellenborough's own holding, it could only be affected, if at all, *pro tanto*. But we as much doubt this part of the holding in *Moore v. Clementson*, 2 Camp. 22, as we do that of *Kymer v. Suwercroft*, 1 Camp. 109, 180 c., as applicable, at least, to the case of a factor or commission merchant.

name of their principal, but there was evidence to show that the plaintiffs knew he was a foreigner. The verdict and judgment were for the plaintiffs. The Queen's Bench Division held that the contract being "for and on account of owner," the brokers on the face of the contract were not liable; and that the custom was so inconsistent with the contract, that evidence of the custom was inadmissible. Otherwise, the contract, as affected by the custom, would be: "We have sold for our principals," but "we have not sold for our principals, but for ourselves," which would be a direct contradiction. They therefore reversed the judgment. This transparently bad reasoning did not prevail. The real contract as explained by the custom was: "We have sold for our principal, but in the absence of a disclosure of our principal at the time of making the contract, then we make ourselves personally liable." There is nothing contradictory or inconsistent in this. And so, on appeal, the Court of Appeal held. Fry, L. J., puts the matters very clearly and briefly, thus: "If the objection were now being taken for the first time to the admissibility of evidence of a custom to charge the brokers as principals in the event of non-disclosure by them of their principals at the time of the contract, I should have paused before deciding in favor of its admissibility. But that proposition is now clearly established; and we have only to consider whether, by the custom of the trade, the defendants were liable from the beginning as principals, and whether such a custom contradicts the written contract. I can entertain no doubt on either point. By the terms of the document itself, the owner is liable. The custom says the broker shall be liable also. There is nothing in that which is inconsistent with the contract; though it would be inconsistent if the custom were to exclude the liability of the owner."¹

¹ Pike v. Ongley, 18 Q. B. Div. 708, 713. See Hutchinson v. Tatham, L. R. 8 C. P. 482; Fleet v. Murton, L. R. 7 Q. B. 126; Humphrey v. Dale, 7 E. & B. at p. 276. A fair conclusion as to the result of the authorities is that a contract made by a broker, "for, or on account of," or "as agents for" a principal, whether this appears in the body of the contract or by the signature, does not render the broker liable as a principal, where he was, in fact, actually contracting for a principal; but evidence of usage may be given to show that the broker is also liable, if, for instance, he fail to disclose his principal; this not taking away the liability of the principal, but adding another party to the contract, as liable; just as, in contracts made with an agent in his own name, the liability of the principal is also added

when it is discovered there is a principal. But the converse of the rule does not hold good. One who contracts as a principal, though he be, in fact, contracting for another, cannot give evidence of a custom that he has not the liability which, on the face of the contract, he admits he has. This seems a little inconsistent, but it is not really so. The well-known principle of estoppel applies. One who holds himself out as principal, and expressly contracts as such, is estopped from denying that he is a principal, and equally so, from showing that there is a custom which, repugnant to the contract, shows him other than he has declared himself to be. But one who contracts with another who declares himself to be an agent is no more estopped by the declaration of that other from showing, by custom, or by

A broker cannot sue in his own name upon contracts made by him as broker. Thus, where the plaintiff, a broker, signed and delivered to the defendants a bought note for cotton, in the following form. "I have this day sold you on account of B. & C. E. F., broker," it was held that he was not a contracting party, and could not sue the defendants for breach of the contract in refusing to accept the cotton.¹ Some of the text-books have stated the principle otherwise,² but they are disapproved. Kelly, C. B., points out the proper distinction; thus: "The numerous cases

the fact that the alleged agent really had no principal, that the nominal agent is really liable as a principal, than he is estopped from showing that one who nominally contracts as a principal is really but the agent, and that another is liable as the real principal. He has the right of holding the party to the contract who has made himself a party to it, but there is no estoppel affecting him from showing that another is liable as principal or as a dormant partner, to the contract, made by the agent or partner of the undisclosed principal, or the dormant partner. This, we think, reconciles the decisions in the matter, which, at a first glance, seem inconsistent and irreconcilable. *Hutchinson v. Tatham*, L. R. 8 C. P. 482, is a case very similar to that of *Pike v. Ongley*, 18 Q. B. Div. 708. While in neither of them is the court at all clear as to the ground upon which the decisions and others analogous to them can rest, we think that the ground stated by us above is the tenable one. See also, *Fairlie v. Fenton*, L. R. 5 Ex. 169; *Noble v. Kennoway*, 2 Doug. 510; *Higgins v. Senior*, 8 M. & W. 834; *Trueman v. Loder*, 11 A. & E. 589; *Magee v. Atkinson*, 2 M. & W. 440; *Carr v. Jackson*, 7 Ex. 332; *Humble v. Hunter*, 12 Q. B. 310. In *Bickerton v. Burrell*, 5 M. & S. 383, a plaintiff who made a contract as agent, and sued as principal, was nonsuited. It was claimed that he was not estopped from showing that he was agent. Lord Ellenborough, dealing with this question, says: "In the ordinary transactions of commerce, a man may sell or purchase in his own name, and yet it does not follow that the contract is his, but the transaction is open to explanation, and others who do not appear as parties to the contract are frequently disclosed, and step in to demand the benefit of it. But where a man assigns to himself the character of agent to another whom he names, I am not aware that the law will permit him to shift his situation, and to declare himself the principal, and the other to be a mere creature of straw. That, I believe, has never yet been attempted. Now, on

the face of this agreement, it is stated that the plaintiff made the purchase, paid the deposit, and agreed to comply with the conditions of sale for Richardson, and in the mere character of agent. Is not this account of himself to be taken *fortissimé contra proficentem*; that is, that he was really treating in the character which he assigned to himself at the time of the purchase? And has not the defendant, with whom the plaintiff dealt as agent, a right still to consider him as such, notwithstanding he would now sue in the character of principal?" See further, *Higgins v. Senior*, 8 M. & W. 834, 844; *Jones v. Littledale*, 6 A. & E. 486; *Magee v. Atkinson*, 2 M. & W. 440; *Sowerby v. Butcher*, 2 C. & M. 371; *Pentz v. Stanton*, 10 Wend. 277; *Stackpole v. Arnold*, 11 Mass. 27; *Graves v. Boston Marine Ins. Co.*, 2 Cranch, 419; *Lucas v. De la Cour*, 1 M. & S. 249; *Robson v. Drummond*, 2 B. & Ad. 303. The same position is taken in *Rayner v. Grote*, 15 M. & W. 359, 365, concurring with the doctrine as to estoppel, *per* Lord Ellenborough, in *Bickerton v. Burrell*, 5 M. & S. 383, as to "all executory contracts, if wholly unperformed, or if partly performed without the knowledge of who is the real principal," being within the rule that one who describes himself as agent is estopped from claiming that he is a principal. In *Bickerton v. Burrell* another ground than estoppel was also relied on, but in *Rayner v. Grote*, it was intimated that the case was not tenable on that ground, but on that of estoppel. See, however, *Schmaltz v. Avery*, 16 Q. B. 665, 662, where the case is put upon the not very satisfactory ground, that as the charter-party was entered into by the plaintiff as "agent of the freighter," any one could be named as the principal as "freighter," and, therefore, that the agent could do so, although it involved the peculiar feature of being the agent of himself.

¹ *Fairlie v. Fenton*, L. R. 5 Ex. 169.

² *Chitty on Plead.* 7th ed., vol. i. p. 8; *Hammond on Parties* (8vo. 1817), adopted in *Lush on Practice*, 3rd ed., p. 11.

cited to us show that in certain contracts the agent may himself sue as principal; but in none does it appear that a broker has successfully maintained an action on a contract made by him as broker. He may, no doubt, frame a contract in such a way as to make himself a party to it, and entitled to sue, but when he contracts in the ordinary form, describing and signing himself as a broker, and naming his principal, no action is maintainable by him. Though innumerable contracts of this nature daily take place, yet no instance has occurred within my own recollection, nor has any instance been cited to us, where an action has been brought by a broker describing himself as such in the contract, and not using words which expressly or by necessary implication make him the contracting party. Without further arguing the point, it is enough to refer to this unbroken rule as the settled law upon the subject."¹

In *Irvine v. Watson*,² the cases were acted on, in which it has been decided that there is a distinction between cases where an agent in effecting a contract for the purchase of goods does not disclose the existence of a principal at all, and those where he discloses that he has a principal but does not give his name. In the former class of cases, it was held that it is settled law that the seller, upon discovery of the principal, cannot have recourse to him, if in the mean while the principal has, *bonâ fide*, paid the agent. But it was further held that, in the latter class of cases, the seller may have recourse to the principal, though he has, *bonâ fide*, paid the agent for the goods, unless there has been such conduct on the seller's part, *e. g.*, delay in applying to the principal, as might justify the principal in concluding that the seller was not looking to his credit, but to that of the agent.

Thus, in this case,³ the defendants employed C., a broker, to buy oil for them. C., accordingly, bought of the plaintiffs, informing them at the time of the sale that he was buying for principals, though he did not tell them who those principals were. The terms of the sale were "cash on or before delivery;" but, though it is not infrequent in the oil trade in such a case to require payment before delivery, there is no invariable custom to that effect. The

¹ *Fairlie v. Fenton*, L. R. 5 Ex. at p. 171. See *Fisher v. Marsh*, 6 B. & S. at p. 416; *Bramwell v. Spiller*, 21 L. T. N. s. 672; *Fawkes v. Lamb*, 31 L. J. Q. B. 98. See *Baring v. Corrie*, 2 B. & Ald. 137, as to the distinction between a broker and factor, as to the right of set-off. And see *George v. Claggett*, 7 T. R. 359; *Escott v. Milward*, Co. Bank. Laws, 236; *Rabone v. Williams*, 7 T. R. 360 n.; *Serimshire v. Alderton*, 2 Str. 1182; *Morris v. Cleasby*,

4 M. & S. 566; *Moore v. Clementson*, 2 Camp. 22; *Hern v. Nichols*, Salk, 239. An auctioneer, having a lien on the goods and price, is also distinguished from a broker as to the right to sue in his own name. *Williams v. Millington*, 1 H. Bl. 81; *Robinson v. Rutter*, 4 E. & B. 954; *Fisher v. Marsh*, 6 B. & S. 411.

² 5 Q. B. Div. 102.

³ *Irvine v. Watson*, 5 Q. B. Div. 102; and, on appeal, *Ibid.* 414.

plaintiffs delivered the oil to C. without insisting on prepayment, and the defendants, not knowing that the plaintiffs had not been paid, paid C. shortly afterwards. C. stopped payment, and the plaintiffs thereupon sued the defendants for the price. The Court of Appeal held, affirming the judgment of Bowen, J., that, as the plaintiffs, at the time of the sale, knew the broker was buying for principals, and not on his own account, the fact of the defendants having paid the broker did not preclude the plaintiffs from suing them for the price, unless, before such payment, they had by their conduct induced the defendants to believe that they had already been paid by the broker; and that the mere omission on the part of the plaintiffs to insist on prepayment, was not, in the absence of an invariable custom to that effect, such conduct as would reasonably induce such belief. The defendants were, accordingly, held liable to the plaintiffs for the price of the oil, notwithstanding their payments therefor to the agents.¹

An agent of the Cherokee nation is not liable personally on contracts made with the nation in connection with their removal beyond the Mississippi River. He acts as a public officer for his government, and the rule as regards him is, that he is not personally responsible on any contract he may make in his official capacity; and wherever his contract or engagement is connected with a subject fairly within the scope of his authority, it shall be intended to have been made officially, and in his public character, unless the contrary appears by satisfactory evidence of an absolute and unqualified engagement to be personally liable.²

If powers given to an agent to sell are ambiguous, and are reasonably construed by the agent and a third person dealing with him, the principal is bound, though it should prove not to have been the construction intended by the principal.³ In this case the United States Supreme Court acted on this principle in holding that a power to an agent to sell lands on such terms in all respects as he might deem most advantageous, and to execute deeds of conveyance necessary for the full and perfect transfer of the title, authorizes the agent to insert in the deed the usual covenants of warranty.⁴

¹ See *ante*, note 1, to p. 561, where we have fully considered the question. It is fancied in this case that the decisions in *Smyth v. Anderson*, 7 C. B. 21; *Heald v. Kelworthy*, 10 Ex. 739, and *Armstrong v. Stokes*, L. R. 7 Q. B. 598, are irreconcilable. But we think we have shown in our note, *ante*, to *Armstrong v. Stokes*, that such is not the case, and that we have there clearly shown, on a full examination of the authorities, what the law on the question really is.

² *Parks v. Ross*, 11 How. 362. This was put on the ground that it is an established rule of law, that an agent who contracts in the name of his principal is not liable to a suit on such contract; much less a public officer, acting for his government.

³ *Le Roy v. Beard*, 8 How. 451.

⁴ See *Baring v. Corrie*, 2-B. & Ald. 143; *Courcier v. Ritter*, 4 Wash. C. C. 551.

If the owner of a bill send it to an agent, not residing at the place where it is payable, for collection, the agent has an implied authority to employ a sub-agent at the place where it is payable; and if the sub-agent receive the contents, the owner can sue him for money had and received, though the sub-agent had no notice when he collected the money that the agent was not the owner. And, in such a case, the sub-agent cannot retain part of the proceeds, on account of a debt of the agent, unless he has given credit on the faith that the agent owned the bill.¹

Merchants in London, upon the instruction of shipping agents at Havannah with respect to a cargo of tobacco to be consigned to the London merchants, and after receiving the shipping documents, effected policies of marine insurance in the ordinary form on behalf and for the benefit of all parties whom it might concern. The Havannah agents shipped and consigned the tobacco in their own names, but were in fact acting as commission merchants for Havannah merchants to whom the tobacco belonged; and the London merchants before effecting the policies had notice that the Havannah agents had an unnamed principal. A total loss having occurred, the London merchants received the policy moneys, but, before receipt, had notice that the moneys were claimed by the Havannah principals. On appeal from an order of the Court of Appeal,² reversing a judgment of Manisty, J., in favor of the defendants, the House of Lords held, affirming the decision of the Court of Appeal, that an action lay by the Havannah principals against the London merchants for the policy moneys; that the London merchants were not entitled to a lien upon the moneys for the balance of their general account with the Havannah agents, and could not in that action set off their claim to that balance, or set off anything except the premiums, stamps, and commission in respect of the insurance.³ The fact of the principals being *foreign* principals did not affect the case. They having been the owners of the tobacco, and the money recovered under the policy having been received by the defendants after they had knowledge that the plaintiffs were the previously undisclosed principals referred to by their agents, the House of Lords held, that, under the old form of pleading, money had and received for the use of the

¹ *Wilson v. Smith*, 3 How. 763. This case followed *Bank of the Metropolis v. The New England Bank*, 1 How. 234.

No action against any other person will lie on negotiable promissory notes bearing no name but that of the maker. *Cragin v. Lovell*, 109 U. S. 194; *Nash v. Towne*, 5 Wall. 689, 703; *Williams v. Robbins*, 16 Gray, 77; *In re Andanson Fibre Co.* L. R. 9 Ch. 635; *Daniels v. Burnham*, 2

La. 243, 245. This does not come within that class of cases in which the name of the principal appears on the face of the note. *Mechanics' Bank of Alexandria v. Bank of Columbia*, 5 Wheat. 326; *Metcalf v. Williams*, 104 U. S. 93; *Hitchcock v. Buchanan*, 104 U. S. 416.

² *Maspous v. Mildred*, 9 Q. B. Div. 530.

³ *Mildred v. Maspons*, 8 Ap. Cas. 874.

plaintiffs would lie against the defendants for money so received.¹ Lord Blackburn took the position that the case would also come under the Factors' Act, but as neither of the other lords sitting with him assented to that position, the case was not decided on that ground, although, evidently, Lord Blackburn had very decided views that the case came within the act.²

B. W. & Co., who had contracted with a colliery company for 10,000 tons of coal, to be delivered over a period of three months at a spout on the Tyne, "the turn to be mutually agreed upon," proposed to charter a foreign ship for the conveyance of 29 keels of Elsinore, and tendered to the captain a charter-party which stipulated for demurrage in unloading the ship, but made no provision for detention in loading her. The captain declined to sign such a charter without an assurance that there should be no undue detention of his ship; and thereupon, B. W. & Co. obtained from the defendant (who was a clerk employed by several colliery companies to arrange the terms for loading) the following undertaking: "I undertake to load the ship *Der Versuch*, 29 keels, with Bebside coals in ten colliery working days, etc. On account of Bebside Colliery, W. L. Hoggett." This memorandum (which made no mention of the person contracted with) was communicated by the charterers to the captain of *Der Versuch*, who thereupon accepted the charter. The vessel being detained in loading beyond the stipulated ten days, the captain called upon the defendant to pay him £45 for demurrage. The defendant repudiated all liability, but ultimately offered to pay the captain £20. The defendant had no notice of the charter. In an action by the captain to recover £45 for demurrage from the defendant, it was held that, upon these facts, a jury were warranted in finding that the undertaking to load within ten days was a contract between

¹ *Du Bussche v. Alt*, 8 Ch. Div. 286; *Mann v. Forrester*, 4 Camp. 60; *Bodenham v. Hoskins*, 21 L. J. N. S. (Ch.) 864; *Pannell v. Hurley*, 2 Coll. 241; *Ex parte Kingston*, L. R. 6 Ch. 632; *Lanyon v. Blanchard*, 2 Camp. 596; *Maanss v. Henderson*, 1 East, 335; *McFarlane v. Norris*, 2 B. & S. 783; *Meyer v. Dresser*, 16 C. B. N. S. 646, 665; *Fish v. Kemp-ton*, 7 C. B. 687; *Savenza v. Brinsley*, 18 C. B. N. S. 467; *Ex parte Dixon*, 4 Ch. Div. 133; *Irvine v. Watson*, 5 Q. B. Div. 102, 414; *Lanyon v. Blanchard*, 2 Camp. 596; *Ex parte Cook*, 4 Ch. Div. 123; *Knatchbull v. Hallett*, 13 Ch. Div. 696, 709.

² Under the Factors' Acts (including 5 & 6 Vic. c. 39) the consignee of goods is given a lien for advances on goods received from a consignor, as the apparent owner

of the goods, "provided such consignee shall not have had notice by the bill of lading or otherwise," etc. "that such person so shipping in his own name is not the actual and *bona fide* owner of such goods." Lord Blackburn held that this was but in affirmance of the common law, to the effect that knowledge, however obtained, that the goods were not the property of the person dealing as a principal, prevented the advancee from having a lien for the advances made after such knowledge, on the ground that it was unjust, with knowledge, to take one's goods to pay another's debts; and that the case was governed by the exception in the statute. *Mildred v. Maspons*, 8 App. Cas. at p. 884, *et seq.* But the case was decided on common-law principles, irrespective of the Acts.

the captain and the defendant; that there was sufficient consideration for it; and that the contract was with the defendant personally, and not as agent.¹

The defendant, an estate agent, contracted to sell land to the plaintiff, who paid a deposit. The defendant signed a receipt in his own name for the deposit, and the plaintiff signed an agreement containing the terms of the purchase. The owner of the land refused to complete the purchase, and the plaintiff sued the defendant for damages for breach of the contract to sell. At the trial, the jury found that the defendant sold as principal. Held, that the defendant was personally liable, and that the agreement and receipt taken together formed a sufficient contract to satisfy the statute of frauds.²

K., an agent of the plaintiffs, having authority to sell goods for them and to receive payment in cash or by cheque, but having no authority to indorse cheques, received from the defendants a cheque on their bankers, drawn payable to "S. & Co. [the name of the plaintiff's firm] or order," and fraudulently indorsed it, "S. & Co., *per* S. K., agent," and misappropriated the proceeds. The bankers paid the cheque and returned it to the defendants, and charged the amount to their account. The court held that an indorsement of a cheque "*per* procuration," or "as agent," purports to be an indorsement by the payee within 16 and 17 Vic., c. 59, so as to protect the banker who has paid it, though the person by whom such indorsement is made has no authority to indorse it; and, therefore, that, in this case, such payment by the bankers was a payment within the protection of the statute, and that the plaintiffs could not sue the defendants either for the price of the goods or for an alleged conversion of the cheque.³

¹ Weidner v. Hoggett, 1 C. P. D. 533. See Tanner v. Christian, 4 E. & B. 59; Lennard v. Robinson, 5 E. & B. 125; Parker v. Winlow, 7 E. & B. 942, as to an agent signing. The main question involved in Weidner v. Hoggett, 1 C. P. Div. 533, was, as to whether, no name being mentioned with whom the undertaking was made, the captain could take the benefit of the contract, and it was held that it was a contract made with the captain as an undisclosed principal.

² Long v. Millar, 4 C. P. Div. 450. And see Higgins v. Senior, 8 M. & W. 834; Jones v. Littleddale, 6 A. & E. 486; Ridgway v. Wharton, 6 H. L. C. 238; Allen v. Bennet, 3 Taunt. 169; Calder v. Dobell, L. R. 6 C. P. 486; Baumann v. James, L. R. 3 Ch. 508; Jones v. Victoria Graving Dock Co., 2 Q. B. Div. 314.

³ Charles v. Blackwell, 1 C. P. Div. 548;

affirmed, on appeal, by the Court of Appeals, 2 C. P. Div. 151. By the 19th section of the act it is provided that any draft or order drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such indorsement, or any subsequent indorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable either by the drawer or any indorser thereof. Hare v. Copland, 13 Ir. C. L. 426, is to the same effect, under this act, as Charles v. Blackwell, 1 C. P. Div. 548; 2 C. P. Div. 151.

It has been held that in order to constitute a valid defence within the rule in *George v. Clagett*,¹ the plea should show that the contract was made by a person whom the plaintiff had intrusted with the possession of the goods; that that person sold them as his own goods in his own name, as principal, with the authority of the plaintiff; that the defendant dealt with him as, and believed him to be, the principal in the transaction; and that, before the defendant was undeceived in that respect, the set-off accrued. It is not necessary in such a plea to negative "means of knowledge" that the seller was dealing as an agent.²

To a count for goods sold and delivered, the defendants pleaded that the goods were sold and delivered to them by S., then being the agent of the plaintiffs, and intrusted by them with the goods as apparent owner thereof; that S. sold the goods in his own name, and as his own goods, with the consent of the plaintiffs; that, at the time of the sale, the defendants believed S. to be the owner of the goods, and did not know that the plaintiffs were the owners of or interested therein, or that S. was agent; and that, before the defendants knew that the plaintiffs were the owners of the goods or that S. was agent in the sale thereof, S. became indebted to the defendants, etc.; claiming a set-off. Replication, that, before the sale by S. the defendants had the *means of knowing* that he was merely apparent owner of the goods, and that the same were intrusted to him as agent, and that S. was agent, and as such, sold the goods to defendants. Held, that the plea was good, and the replication no answer to it.³

In *Cookson v. The Bank of England*, cited in *Hare v. Copland*, Martin, B., at *nisi prius*, held, that the section covered indorsements by procuration. The only report of *Cookson v. The Bank of England* was in the notes of a short-hand reporter for the London Times newspaper, which led to some satirical remarks by Christian, J., in *Hare v. Copland* ("Really, after having stooped so low for an authority, we are but ill rewarded for our humility," 13 Ir. C. L. at p. 439); but the case was approved by Lindley, J., in *Charles v. Blackwell*, 1 C. P. Div. at p. 555. See, as to checks being payment before the statute, *Hansard v. Robinson*, 7 B. & C. 90; *Crowe v. Clay*, 9 Ex. 604; and as to effect, then, of their being signed "by procuration," *Alexander v. Mackenzie*, 6 C. B. 766; *Stagg v. Elliott*, 12 C. B. n. s. 373.

¹ If a factor who sells under a *del credere* commission sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor against the

demands for the goods made by the principal. *George v. Clagett*, 7 T. R. 359.

² *Borries v. Imperial Ottoman Bank*, L. R. 9 C. P. 38.

³ *Borries v. Imperial Ottoman Bank*, *Ib.* Coleridge, C. J., in a few words, places the matter on the correct basis, thus: "It was, in the first place, contended that the plea should have averred not only that the defendants did not know that the plaintiffs were the owners of the goods, and believed S. to be the owners, but also that the defendants had not the means of knowledge that S. was not owner, but was acting in the sale as agent. It appears to me, however, that the plea states all that is material to raise the defence. It states that the plaintiffs intrusted S. with the goods for sale; that they sold them; and that the defendants bought them believing S. to be the owner of them. *The essence of the defence is, the real state of the defendants' minds when they bought the goods of S.* They assert that it was this: that they believed the goods to be the goods of S., and did not

That a broker or agent employed to sell has *prima facie* no authority to receive payment otherwise than in money, according to the usual course of business, is well established; and it is equally as clear that, if instead of paying money the debtor writes off a debt due to him from the agent, such a transaction is not payment as against the principal, who is no party to the agreement, though it may have been agreed to by the agent.

Thus, where A., a broker, sold some cotton yarn to the defendant; before its delivery the defendant paid to A., in advance, £1000 on his general account. Part of the yarn was sold by A. as agent for the plaintiff on a *del credere* commission. The value of the yarn being more than £1000, the defendant paid the difference to A. in cash, and so balanced the accounts between them. A. did not pay over to the plaintiff the value of his yarn, and became bankrupt. It was held, that the defendant was still liable to the plaintiff for the price of the yarn, except to

know or believe that the plaintiffs were the owners of or interested in them. This brings the case distinctly within the rule in *George v. Clagett*, 7 T. R. 359, and that is the form of plea which has been commonly in use to raise a defence of this kind. . . . The plea being good, it follows that the replication, which merely states that at the time of the sale the defendants had *the means of knowing* that S. was only apparent owner, and was intrusted with the goods as agents of the plaintiffs, is no answer to the plea, being a mere statement of a fact which was immaterial." *Borries v. Imperial Ottoman Bank*, L. R. 9 C. P. 38, 45.

A similar question to this came up in a Canadian case, under their Stamp Act (42 Vic. ch. 17), where the plaintiff received a bill which was not stamped; but the plaintiff, although knowing that bills required to be stamped, did not notice that the bill was not stamped, and put it in his safe, where it remained for some two months, when, on the plaintiff's attention being called to the fact that the bill was not stamped, and which was the first time he had actual "knowledge" of that fact, he put on double stamps, the act (section 13) making bills good providing that, in such a case, double stamps are put on by the holder as soon as he acquires the knowledge that the instrument is defective for want of stamps. The Supreme Court of Canada, affirming the judgment of a majority of the Supreme Court of New Brunswick, *Weldon and Wetmore, JJs.*, dissenting (*Tufts v. Chapman*, 22 N. B. R. 195), held that the bill was good; having the means of knowledge by the holder not

being equivalent to the actual knowledge which was meant by the act. *Chapman v. Tufts*, 8 Can. Sup. Ct. 543. *Allen, C. J.*, in delivering the judgment of the majority of the New Brunswick Court, said: "Whether the bill was improperly received in evidence depends upon the construction to be given to the 13th section of the Stamp Act, 42 Vic. c. 17, which authorizes any holder of a bill or note not stamped, or insufficiently stamped, to affix double duty stamps, if, when he became holder thereof, he had 'no knowledge of such defect,' and paid the double duty 'as soon as he acquired such knowledge.' . . . If by the word 'knowledge' is to be understood actual information of the fact, then I am unable, from the plaintiff's evidence, to satisfy myself that he knew the bill was not stamped when he took it. When he said his 'first knowledge' of the fact was when his attorney called his attention to it, he must have meant that his mind was never directed to that defect before; though, having the bill in his possession, he clearly had the means of knowledge nearly two months before. If he 'never gave it a thought,' I do not see how it can be said that he knew it was not stamped, or how a man can be said to have knowledge of a fact that he has never thought of." See *House v. House*, 24 U. C. C. P. 526, under the same act, and to the same effect. The dissenting judgment of *Wetmore, J.*, in the New Brunswick Court, is full of absurdities. See his grossly contradictory statements of the evidence in the case on pp. 201, 204, of the report. Clearly, in such cases, having the means of knowledge is not equivalent to actual knowledge.

the extent of the cash payment, the advance of £1000 to A. not amounting to a prepayment, because it was on the general account, and the settlement of accounts not constituting payment as against the plaintiff; as an agent, whether acting on a *del credere* commission or not, is only authorized to receive payment in cash, in the absence of any practice or custom to the contrary.¹

The question came up again in the Exchequer Chamber, on appeal from the decision of the Court of Common Pleas,² in which counsel for the defendant claimed that the settlement with A. amounted to payment as against the plaintiff; but that it was, at any rate, a question for the jury, depending upon what authority, express or implied, A. had from the plaintiff in respect of the mode of receiving payment. The court held that it was a question of fact for the jury, whether a payment to a broker in advance was a good payment as against the principal, depending on the custom of the trade;³ and as that question had not been left to the jury, the court ordered a new trial. There was no evidence on the trial given of any such custom; such a question was not asked to be submitted to the jury, nor was there any such point taken at the Court of Common Pleas. And there is nothing in the case in the Exchequer Chamber to question the correctness of the decision in the Common Pleas in such cases as that was treated to be; viz., one in which no such custom was

¹ Catterall v. Hindle, L. R. 1 C. P. 186. Abbott, C. J., in Russell v. Bangle, 4 B. & Ald. 395, 398, says: "The general rule of law is, that if a creditor employs an agent to receive money of a debtor, and the agent receives it, the debtor is discharged as against the principal; but if the agent, instead of receiving money, writes off money due from him to the debtor, then the latter is not discharged." See Bartlett v. Pentland, 10 B. & C. 760; Underwood v. Nichols, 17 C. B. 329; Fish v. Kempton, 7 C. B. 687; Scott v. Irving, 1 B. & Ad. 605; Sweeting v. Pearce, 9 C. B. n. s. 534.

² L. R. 2 C. P. 368.

³ It was held in Todd v. Reid, 4 B. & Ald. 210, that an insurance broker is only entitled to receive payment for the assured from the underwriter in money; and, therefore, a custom to set off the general balance due from the broker to the underwriter, in the settlement of a particular loss, is illegal, as an attempt to establish a custom to pay the debt of one person with the money of another. But the contrary was decided in Stewart v. Aberdeen, 211, 228, Lord Abinger there saying: "It must not be considered that by this decision the court means to over-

rule any case deciding that where a principal employs an agent to receive money and pay it over to him, the agent does not thereby acquire any authority to pay a demand of his own upon the debtor by a set-off in account with him. But the court is of opinion that where an insurance broker, or other mercantile agent, has been employed to receive money for another in the general course of his business, and where the known general course of business is for the agent to keep a running account with the principal, and to credit him with sums which he may have received by credits in account with the debtors, with whom he also keeps running accounts, and not merely with moneys actually received, the rule laid down in those cases cannot properly be applied; but it must be understood that where an account is *bonâ fide* settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor, according to the meaning and intention, and with the authority, of the principal." But see Sweeting v. Pearce, 9 C. B. n. s. 534, where Todd v. Reid, 4 B. & Ald. 210, is approved. And see Bayley v. Wilkins, 7 C. B. 886; Gabay v. Lloyd, 3 B. & C. 793.

shown as is referred to in the Exchequer Chamber. In all such cases, the law as laid down in the case in the Common Pleas was not doubted, but rather was affirmed; and even the ordering a new trial at all seems, under the circumstances, to have been more than questionable.

The plaintiff sold stores for a ship to T., who was ship's husband and managing owner. The defendant was part-owner of the ship, and was also interested jointly with T. in the adventure for which the ship was being fitted out. The plaintiff applied to T. for payment, but did not obtain it. Three months after the goods were supplied, and again two years after that, the defendant settled accounts with T., and gave him credit for the price of the goods, supposing that they had been paid for. More than three years after the goods had been supplied, T. having become bankrupt, the plaintiff for the first time applied for payment to the defendant and brought his action for the debt. The position taken in defence was that the plaintiff had been guilty of *laches* in giving T. the unreasonable credit which he did, thereby electing him as sole creditor and thus discharging the principal. This view was sustained by Mathew, J., who gave judgment for the defendant. On appeal to the Court of Appeal the judgment of Mathew, J., was reversed. The Court of Appeal held, that, in order to discharge a principal from his liability for a debt contracted by his agent, the principal must show that the creditor has himself misled him into supposing that he has elected to give exclusive credit to the agent, and that the principal has been prejudiced by that supposition; that mere delay in enforcing payment from the agent will not be sufficient for the purpose; and that there had been no such conduct on the part of the plaintiff as would discharge the defendant from his liability.¹

¹ Davison v. Donaldson, 9 Q. B. Div. 623. In discussing the questions involved in the case, where the principal knew that there was a seller, the observations of Jessel, M. R., as a whole, accord with the principles we have laid down, as an explanation of the cases, in our note, *supra*, to Armstrong v. Stokes, L. R. 7 Q. B. 598. He says: "No doubt there is a well-known principle of equity which has been long acted on, sometimes by the courts of equity, and sometimes by the courts of common law, for the equity is the same in both courts, that if the defendant has been misled by the plaintiff, either by his words or his conduct, to believe that which is not true, so that his position is altered, the plaintiff cannot be heard to deny the truth of what he has thus led the defendant to believe. This is well laid down in

Irvine v. Watson, 5 Q. B. Div. 414. In that case the defendants had paid the broker, and the question was whether that discharged their liability to the plaintiffs. Bramwell, L. J., says (*Ibid.*, p. 416): "I think it impossible to say that it discharged them, unless they were misled by some conduct of the plaintiffs into the belief that the broker had already settled with the plaintiffs, and made such payment in consequence of such belief." Now, assuming that there is no distinction in this respect between a partnership and a case of principal and agent, that observation applies exactly to this case. The payment which the defendant made was not made in consequence of being misled by the plaintiff. The mere fact that by the conduct of the plaintiff he lost the opportunity of getting the money back, is not sufficient. Then

The Supreme Court of the United States in *Parsons v. Armor*,¹ in the case of an order by a principal in Boston to his agent in

Baggallay, L. J. (*Ibid.*, 418), speaking of Parke, B.'s observations in *Heald v. Kenworthy*, 5 Q. B. Div. 418, says: 'He sought to limit the qualification of the general rule to cases in which the seller by some conduct has misled the buyer into believing that a settlement has been made with the agent. And if that limitation is correct, I am of opinion that there is no such payment as could discharge the defendants.' And Brett, L. J., says (5 Q. B. Div. 420): 'And Parke, B., after citing the *dictum* of Bayley, J., to the effect that the seller cannot sue the principal if the state of the accounts between the principal and the agent would make it inequitable that he should do so, proceeds to ask what equity there can be, unless it is something arising out of the conduct of the seller, something to induce the defendant to believe that a settlement has already been made with the agent.' And then referring to *Armstrong v. Stokes*, L. R. 7 Q. B. 598, he says: 'Probably this decision means this, that *when the seller deals with the agent as sole principal, and the nature of the agent's business is such that the buyer ought to believe that the seller has so dealt, in such a case it would be unjust to allow the seller to recover from the principal after he paid the agent.*' All the judges agreed in laying down that, where the seller knows that there is a principal behind the person with whom he is dealing [that is, in effect, where the credit is not given solely to the agent], he must be shown to have done something which raises an equity against him, otherwise the principal is not discharged; though I am far from saying that there may not be special cases in which mere delay on the part of the plaintiff would be held to be sufficiently misleading conduct; it may amount to a representation that he has been paid.' The case of *Smethurst v. Mitchell*, 28 L. J. Q. B. 241, is a case very similar to that of *Armstrong v. Stokes*, L. R. 7 Q. B. 598, and goes far towards according with the views we have expressed, and the principles we have stated, in our note to the latter case. See *supra*, p. 561 *et seq.*, note. In *Smethurst v. Mitchell*, 28 L. J. Q. B. 241 (also reported 1 E. & E. 622), H., who was a commission agent, ordered of the plaintiff shirtings, in August and September, 1857, which were entered in the plaintiff's books to H. as the purchaser, and the goods and invoices were sent to him, debiting him with the price. By the course of dealing

the price became due in cash, minus discount, on the last Friday in October, 1857. H. had been employed for several years by the defendant (who was a merchant in England and Canada), to buy goods for him, and the course of dealing between them was for the defendant to give H. acceptances from time to time, at four months, in order to keep him in funds to meet the current account. The shirtings were bought by H., pursuant to orders from the defendant, and being sold by the plaintiff "in the gray," H. got them finished, and invoiced them from himself to the defendant, charging the cost price of the goods and of finishing, and a commission to himself of two per cent.; and the goods when finished were sent by H. to be shipped on the defendant's account to Canada. The defendant suspended payment on October 13; but he had sent between that day and August acceptances more than sufficient to cover the price of the shirtings and all other orders, and H. had discounted the bills, which had thus got into the hands of third persons, but he did not pay the plaintiff on the last Friday in October, or at any other time. On October 16, H. sent the defendant his account current, including the invoice for the shirtings and for other goods, and he credited himself with the price of the goods, and debited himself with the amount of the bills, the balance being in the defendant's favor. At the time of the purchase the plaintiff knew that H. was a commission merchant, but knew nothing of the defendant, nor that the shirtings were for him. In November, 1857, the plaintiff was informed by H. that the defendant was the principal in the purchase; but he took no proceedings whatever in the matter till September, 1858, when he commenced an action against the defendant. After the plaintiff had been informed that the defendant was the principal, the defendant arranged to take up, among others, the bills which had been given to H., by giving promissory notes for the amount; and when these notes became due (before September, 1858), a fresh arrangement was entered into with the creditors at 12s. 6d. in the pound, for which the defendant gave fresh acceptances, which were still running at the time of action brought. H. was a party to both renewals. At the trial it was contended for the defendant, that, on the facts, it was not a matter of agency at all, and that the defendant's credit was not pledged, or intended to be

¹ 3 Pet. 413.

New Orleans, decided, 1. That the agent, having been authorized to buy goods for his principal, and pay for them by funds raised by drawing bills, could not make his principal debtor for the

pledged; but that it was only a sale from the plaintiff to H., and from him to the defendant. The jury, however, found that the purchase was made by H. as agent of the defendant. But, notwithstanding this, Hill, J., raised the *quære*, — "Is that sufficient to charge the principal? or must not the agent be authorized to pledge his principal's credit?" And again, "There may be a distinction between the case where the seller knows he is dealing with the agent of an undisclosed principal, and that where he does not know that there is a principal in the matter. In the former case it may well be, that the seller is bound to make inquiries, and elect between the agent and the principal as soon as the time for payment arrives; or, at any rate, that he *may be bound by any change in the account between the agent and principal to the prejudice of the latter* after that time." In deciding the case, the court held that, even assuming, on the finding of the jury, the plaintiff to have had the right in November, 1857 (when he first knew that the defendant was the principal), to elect between the defendant and H., he must be taken from his conduct actually to have elected to make H. his debtor; or that, having made no election, he had, by lying by for nine months, allowed the defendant to change his position to his prejudice; and that, in either view, he could not recover against the defendant. The court also questioned, whether, H. not having authority to pledge the defendant's credit, the plaintiff had a right of election in November, 1857; and, also, whether the plaintiff, knowing H. to be only an agent, ought not, in order to be able to charge the principal, to have made inquiries for the principal's name when the day for payment arrived. We find that the able counsel in this case (Wilde), took very much the same position that we have taken in our note to *Armstrong v. Stokes* (*ante*, p. 561 *et seq.*), both as to the holding of the court in *Heald v. Kenworthy*, 10 Ex. 739, and as to the correct principle by which this class of cases is governed. He says: "In *Heald v. Kenworthy*, the court assumed that it appeared from the pleadings that the agent to whom the defendant had paid for the goods, was agent to pledge the defendant's credit with the plaintiffs, and they held, that mere payment to the agent was not sufficient to discharge the principal; but that he must go on and show that the plaintiff had induced the pay-

ment to the agent. But if the agent be not authorized to pledge the principal's credit, it does not follow that, in such a case, the conduct of the seller must be shown; and the present case is more like that of a mere servant authorized to purchase goods for cash, in which case the master is not liable if the servant obtains the goods on credit. It may well be sufficient to bar an action against the principal where the agent had no authority to pledge his principal's credit, if the account between them has been altered to the prejudice of the latter, whether the seller's conduct induced the alteration or not." We concur in this view, which is virtually the same as that expressed in our note to *Armstrong v. Stokes*, *supra*.

In *Railroad Co. v. Hanning*, 15 Wall. 649, the court adopted the following as the rule with reference to the responsibility of the principal for the acts done by the agent: The principal is liable for the acts and negligence of the agent in the course of his employment, although he did not authorize or did not know of the acts complained of. So long as he stands in the relation of principal or master to the wrong-doer, the owner is responsible for his acts. When he ceases to be such and the actor is himself the principal and master, not a servant or agent, he alone is responsible. Applying these principles to the case where the respondent had brought an action for damages received by him in crossing the company's premises; the court held, that as the injury was caused by work being done for the company by a contractor, under the direction of the company's engineer, who was to direct and supervise the work; the power of controlling and managing the entire performance of the work being generally in the company, including the possession of the premises, and the direction, management, and control of all the details of the work, the company were liable for damages received by the respondent, caused by the negligence of their contractor. And see *Hilliard v. Richardson*, 3 Gray, 359; *Scammon v. City of Chicago*, 25 Ill. 425; *Pack v. Mayor of New York*, 4 Seld. 222; *Kelly v. Mayor*, 11 N. Y. 432; *Camp v. The Wardens*, 7 La. An. 322; *Painter v. Mayor*, 46 Pa. St. 213; *Storrs v. City of Utica*, 17 N. Y. 104; *Higgins v. The Watervliet Turnpike Co.*, 46 N. Y. 23; *Robbins v. Chicago*, 4 Wall. 679.

price of the goods; 2. That, if the principal instructs his agent to purchase, and pay out of funds in his hands, and the vendor has notice of this instruction, and the agent draws on the principal in favor of the vendor in payment for the goods, the principal is not bound to accept, and the vendor cannot charge him with the price.

In *Lacey v. Hill*,¹ it was held that stockbrokers who have with their own money purchased stock for a principal were justified in immediately selling the stock. Under such circumstances the stockbrokers have a claim against the estate of the principal for the balance due to them on the account, which balance is subject to deduction for any loss which may have been incurred by selling before the next settling day.²

There may be cases, where, as between themselves, parties dealing with each other may intend to do so in the capacity of principal and agent, but their mode of dealing may be such as to constitute them, in fact, vendor and vendee. A similar effect may also occur in any other branch of the contract of sale, or in any other contract. The intention of the parties, which is the very base of the contract, is, as we have stated more than once, to be got at, not only by the declarations of the parties, but by a consideration of the subject of the contract and the surrounding circumstances as well. And it not unfrequently happens that the express declarations of the parties as to their intention are overridden by the contract considered as a whole, by the acts of the parties, or by the circumstances surrounding the contract and considered with it. The cases are numerous where this is held: in cases, for instance, where time has been held to be not of the essence of the contract, though expressly declared in the contract that it shall be; and where, not to multiply instances, it has been stated in a contract that certain amounts shall be liquidated damages and not a penalty; and, from the other language of the

¹ L. R. 8 Ch. Ap. 921.

² Treating the facts in the case as though no question of the usage of the Stock Exchange were relied on, Mellish, L. J., says: "I am not aware that there is any difference between the purchase of stock or shares and the purchase of wheat or cotton. If a broker has purchased a quantity of cotton, or other goods, and has paid for it out of his own money, and has got an order from his principal that he may sell for the purpose of recouping himself the amount which he has actually paid, but the principal has told him, 'I think you had better not sell till the first of August,' and he being afraid the market will fall sells a fortnight too soon, that, upon the

ordinary principles of law, would not entirely deprive him of his right to recover. He would still be entitled to recover the amount he had laid out on behalf of the principal; but the principal would have a counter-claim against him for damage, if any, which might have resulted from the fact of selling a fortnight earlier than he ought to have done. But if it turned out that the market kept continually falling during the fortnight, so that the sale was, in fact, a gain to the principal's estate, in that case there would be nothing to recover." See *Duncan v. Hill*, L. R. 6 Ex. 255; L. R. 8 Ex. 242; *Leney v. Hill*, L. R. 8 Ch. App. 441.

contract and the surrounding circumstances, the contrary of this has been held. The case of *Ex parte White, In re Neville*¹ is one such as we have referred to above, where the parties seemed to look upon their relative position as that of principal and agent; whereas, from their course of dealing, they were held to be vendor and vendee. The facts are thus summarized. T. & Co. were in the habit of sending goods to N. for sale. N. was a partner in the firm of N. & Co., but received these goods on his private account. The course of dealing between T. & Co. and N. was that the goods were accompanied by a price-list. N. sold the goods on what terms he pleased, and each month sent to T. & Co. an account of the goods he had sold, debiting himself with the prices named for them in the price-list, and at the expiration of another month he paid the amount in cash, without any regard to the prices at which he had sold the goods or the length of credit he had given. He paid the money which he had received from the sales into the general account of his firm, and made his payments to T. & Co. through his firm, with whom he kept an account of moneys paid in and drawn out by him in respect of moneys unconnected with the partnership, which account included many items wholly unconnected with the goods of T. & Co. N. & Co. having executed a deed of arrangement with their creditors, T. & Co. sought to prove against the joint estates for the amount standing to N.'s credit with his firm, on the ground that the same arose from moneys belonging to T. & Co., which were improperly placed by N. in the hands of his firm. It was held, reversing the decision of the court below, that such proof could not be admitted; for that the course of dealing showed, that, although both parties might look upon the business as an agency, N. did not, in fact, sell the goods as agent of T. & Co., but on his own account, upon the terms of his paying T. & Co. for them at a fixed rate if he sold them, and the moneys he received for them were, therefore, his own moneys, which T. & Co. had no right to follow.²

¹ L. R. 6 Ch. Ap. 397.

² In delivering judgment, James, L. J., put the following case, as analogous to that which they were deciding: "If a publisher publishes for an author, and sells for the author, and holds all the copies of the book, and at some specified time has to return to the author an account of all those sold, and pay for them at a price fixed between the author and the publisher, the publisher being at liberty to make his own bargain with retail booksellers all over the country, it could never be supposed that the relation of creditor and debtor or vendor and pur-

chaser ever existed between the author and the retail booksellers." And Mellish, L. J.: "I do not say that it is not possible for parties to make a bargain under which the consignee may receive in his remuneration whatever the goods fetch above a certain price, and yet sell them as agent; but the question is whether such a bargain is to be inferred in the present case. If A. hands over his goods to B., and B. is to pay him a certain price if he sells, but is at liberty to sell on what terms he pleases, and B. then sells to C., the natural inference from these facts is, beyond all doubt, that there is a sale

In *Riggs v. Lindsay*¹ it was held, that the defendants having ordered the plaintiff to purchase salt for them, and he having so purchased and drawn, they were bound to accept and pay his bills; and if they did not, he might recover from them the amount of the bills and damages and costs of protest (if he had paid the same), upon a count for money paid, laid out, and expended, and the bill of exchange might be given in evidence on that count. If, after the protest of the bills, the plaintiff sold the salt without orders, it should not prejudice his right of action, although he rendered no account of sales to the defendants. In this case the proceeds of the salt, as admitted by the plaintiff's counsel, were deducted from the plaintiff's demand, and a verdict was rendered for the balance.²

Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. Principals, in the latter category, are in many cases bound by the acts and declarations of their agents, even when the act or declaration was done or made without any authority, if it appear that the act was done or declaration was made by the agent in the course of his regular employment; but the government, or public authority, is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority, or that he had been held out as having authority to do the act, or was employed in his capacity as a public agent to do the act or make the declaration for the government.³ Although a private agent, acting in violation of specific instructions, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from

made to B., and another sale from B. to C., and all the circumstances confirm the view that such was the nature of the dealing here." This is very similar to one of the cases put by us in our note to *Armstrong v. Stokes*, *supra*. See *Benjamin v. Porteous*, 2 H. Bl. 590; *Dixon v. Cooper*, 3 Wils. 40; *Baker v. Bent*, 3 T. R. 27.

Authority, without restriction, to an agent to sell, carries with it authority to warrant. *Schubardt v. Allens*, 1 Wall. 359, 369; *Andrews v. Kneeland*, 9 Cow. 354; *The Monte Allegre*, 9 Wheat. 616. See *Mulhall v. Keenan*, 18 Wall. 342, involving a question of evidence, whether the defendant, in making purchases of cattle, acted as principal or agent.

¹ 7 Cranch, 500.

² On this point the Supreme Court of the United States say: "Nor did the plaintiff's selling the salt after he had taken up these

bills destroy his right of action against the defendants. If he has acted irregularly in so doing, he will be liable, in a proper action, for the damages which the defendants have sustained by such conduct; but such sale could not be pleaded or set up in bar to the present suit. Nor will the defendants, under the circumstances of this case, be injured by the sum which the jury have discounted from the plaintiff's demand, if it shall hereafter appear, that as much was not allowed the defendants on that account as ought to have been." See *Church v. Abell*, 1 Can. S. C. R. 442, where lamentable ignorance as to the principle governing the right to bring a cross-action is shown. We state the case fully in a later volume of this work.

³ *Whiteside v. United States*, 93 U. S. 247; *Lee v. Munroe*, 7 Cranch, 376.

the mistakes of public officers or agents than that a rule should be adopted which, through improper combinations or collusion, might be turned to the detriment and injury of the public.¹ Individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity, and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act.²

Where a vendor employed a broker to sell property in Louisiana, and the broker sold the property on terms satisfactory to both vendor and vendee, but the vendor subsequently refused to complete the sale, the Supreme Court held that the broker was entitled to his commission. The principle is the same whether the property is real or personal.³

¹ Mayor v. Eschback, 17 Md. 282.

² State v. Hayes, 52 Mo. 578; Delafield v. State, 26 Wend. 238; People v. Bank, 24 Wend. 431; Mayor v. Reynolds, 20 Md. 10. An attorney-at-law, *virtute officii*, has no authority to purchase property in the name of his client, and where the client repudiates any such authority, the burden of proof to sustain it is on those who seek to sustain acts done under such alleged authority. Savery v. Sypher, 6 Wall. 157. The United States are not bound by the declarations of their agent, founded upon a mistake of fact, unless it clearly appear that the agent was acting within the scope of his authority, and was empowered in his capacity of agent to make such declaration. Lee v. Munroe, 7 Cranch, 366.

Facts brought to the knowledge of an attorney in his inquiries for his clients respecting a specific matter are considered in law as brought to their knowledge. Information to him of all essential matters affecting the subject he was investigating is in law information to them, and their action must be adjudged accordingly. The law, indeed, goes much further than this. It considers the principal as affected with notice of all facts, notice of which can be charged upon the attorney. Smith v. Ayer, 101 U. S. 320, 325.

Money deposited with bailees to be paid over by them when certain record books which had been stolen were placed in the possession of the bailees, and which was paid over by them in good faith on the receipt of the books, was held to have been properly paid over, although there were slight injuries in some of the record books when received. The court expressed the opinion that if the bailees, as agents of the county owning the record books, had refused to receive them for such a reason, the county would then have had a stronger cause of action against their agents

for breach of their duty. Eldridge v. Hill, 97 U. S. 92.

In Tweed's Case, 16 Wall. 504, the claimant contracted with an agent of the treasury department, under the act of Congress of July 2, 1864 (12 Stat. at Large, 820), to buy cotton in the Confederate States, which had previously belonged to the Confederate Government, three-fourths of cotton so purchased to belong to the claimant and one-fourth to the United States. In addition to purchases so made by him, he made other purchases of cotton which had not belonged to the Confederate Government. The United States claimed one-fourth of this cotton as well as of the other. The Court of Claims held, affirmed by the United States Supreme Court, that they were not entitled to it. Although Bradley and Davis, JJ., dissented from this decision, we can find nothing in the case to warrant any difference of opinion on the simple question it involves.

The United States Government is not responsible for the *laches* or wrongful acts of its officers. A government may be a loser by the negligence of its officers, but it never becomes bound to others for the consequences of such neglect, unless it be by express agreement to that effect. Hart v. United States, 95 U. S. 316; Gibbons v. United States, 8 Wall. 269; United States v. Kirkpatrick, 9 Wheat. 720; United States v. Vanzandt, 11 Wheat. 184; United States v. Nicholl, 12 Wheat. 505; Jones v. United States, 18 Wall. 662.

A power to a general agent of a railway company to make contracts and agreements for borrowing money and making purchases of railroad iron, includes an authority to give collaterals as a security for the money borrowed, or for the payment of a debt incurred for the iron purchased. Hatch v. Coddington, 95 U. S. 48.

³ Rock v. Emmerling, 22 How. 69. The

The case of *Pearson v. Scott*¹ was decided on the principle laid down by Lord Tenterden, in *Bartlett v. Pentland*,² that an authority given by a principal to his agent to receive money cannot be construed into an authority not to receive money, but to allow the debtor to write off as much as may be due from the agent to him. Thus, the plaintiffs, Pearson and others, executors, holding stock in their name, directed their solicitor to sell the stock. The solicitor, in the name of his firm, gave to a stockbroker, the defendant Scott, whom the solicitor had employed in Stock Exchange speculations, directions to sell the stock. The stock was sold by the defendant, and the solicitor returned to the stockbroker transfers of the stock, with receipts indorsed, signed by the executors. The sale was completed, and the defendant sent to the solicitor a cheque for part of the purchase-money for the shares, and carried the balance on the transaction to the credit of the solicitor in the account between them, which account was afterwards settled by a payment made to the stockbroker. Held, that, under the circumstances, the stockbroker must be held to have had notice that the shares were not the property of the solicitor, and that, though the solicitor had from the executors authority to receive the purchase-money, payment to him, by giving him credit in an account between them, was not sufficient to discharge the stockbroker, the defendant, who remained liable to the executors for the balance.³

court say: "Where the vendor is satisfied with the terms, made by himself, through the broker, to the purchaser, and no solid objection can be stated, in any form, to the contract, it would seem to be clear that the commission was due, and ought to be paid. It would be a novel principle if the vendor might capriciously defeat his own contract with his agent by refusing to pay him when he had done all that he was bound to do. The agent might well undertake to procure the purchaser; but this being done, his labor and expense could not avail him, as he could not coerce a willingness to pay the commission which the vendor had agreed. Such a state of things could only arise from an express understanding that the vendor was to pay nothing, unless he should choose to make the sale. The Civil Code of Louisiana declares (Art. 2035) that the condition is considered as fulfilled when the fulfilment of it has been prevented by the party bound to perform it." See, also, *Righter v. Alamon*, 4 Rob. 45; *Wells v. Smith*, 3 La. 501; *Levistones v. Landreaux*, 6 La. An. 26; *Lestrade v. Perrera*, *Id.* 398.

¹ 9 Ch. Div. 198.

² 10 B. & C. 760, 769.

³ See *Baring v. Corrie*, 2 B. & Ald. 137, 144; *Todd v. Reid*, 4 B. & Ald. 210;

Barker v. Greenwood, 2 Y. & C. Ex. 414, 419; *Scott v. Irving*, 1 B. & Ad. 605, 614. In *Sweeting v. Pearce*, 7 C. B. n. s. 449, 485 (affirmed 9 C. B. n. s. 534), Byles, J., thus states the principle: "It is not disputed that the general rule of law is, that an authority to an agent to receive money implies that he is to receive it in cash. If the agent receives the money in cash the probability is that he will hand it over to his principal; but if he is allowed to receive it by means of a settlement of accounts between himself and the debtor, he might not be able to pay it over. At all events, it would very much diminish the chance of the principal ever receiving it; and upon that principle it has been held that the agent as a general rule cannot receive payment in anything else but cash." And Willes, J.: "As a general rule, when a person employs an agent to receive a debt, the agent must receive it in money, and it is not sufficient that the debt should be written off against a debt due from such agent." As to the effect of usage in such a case, see *Scott v. Irving*, 1 B. & Ad. 605; *Sweeting v. Pearce*, 9 C. B. n. s. 534; *Ex parte Cooke*, 4 Ch. Div. 123; *Tomkins v. Jaffery*, 3 App. Cas. 213; *Ben-nell v. Hurley*, 2 Coll. 241; *Bodenham v. Hoskyns*, 2 De G. M. & G. 903.

A company employed an agent for the sale of goods in a shop taken for that purpose. The agent was to be paid a commission on the sale, and he was to accept bills for the company for such a reasonable amount as was represented by the goods on his premises; and if, on the bills arriving at maturity, the agent had not sufficient funds in his hands to meet the bills, the company were to make good the difference. The company failed, and was wound up, and at that time a bill accepted by the agent had not arrived at maturity. In holding that the agent had a lien on the goods, Malins, V. C., says: "When a man receives goods from an ordinary tradesman, and gives a cheque in payment for them, then, as soon as the cheque is paid, the goods are paid for; but if, by arrangement, he gives a promissory note in payment for the goods instead of a cheque, still the transaction is in the same position, and as soon as the promissory note is honored the goods are paid for. Consequently, when the bill was honored the goods were paid for. Could it be contended that the company, after this, could have gone to the house and taken out of Welsford's possession the goods he had paid for? He would have said, 'I have goods in my possession, and you cannot take them away without paying me the amount of the bill which I have accepted.' If they had persisted, he might have come to this court, and would certainly have been entitled to an injunction to restrain the company from removing the goods. The result is, then, that he has paid for the goods, and no doctrine of agent and principal could prevent him from being entitled to retain the goods; and though the company do not actually say you shall have a lien upon the goods, it was implied by the nature of the transaction."¹

The distinction between a general and a special agency is in most cases a plain one. The purpose of the latter is a single transaction, or a transaction with designated persons. It does

¹ *In re Pay's Patent Felted Fabric Co.*, 1 Ch. Div. 631. Evidence of declarations of an agent as to past transactions of his principal are, as mere hearsay, inadmissible. *Goetz v. Bank of Kansas City*, 119 U. S. 551, 560; *Luby v. Hudson River R. R.*, 17 N. Y. 131, 133; *Adams v. Hannibal & St. Joseph R. R.*, 74 Mo. 553.

In the case of *Cliquot's Champagne*, 3 Wall. 114, which was a libel for the forfeiture of goods for under-valuation, the United States Supreme Court enunciated the following principles: 1. Whatever is done by an agent in reference to the business in which he is at the time employed, and within the scope of his authority, is said or done by the principal, and may be proved as well in a criminal as in a civil

case in all respects as if the principal were the actor or the speaker. *American Fur Co. v. United States*, 2 Peters, 364. 2. The Act of 1863 provided that if any "owner, consignee, or agent shall *knowingly*" make a false entry of goods, the goods shall be forfeited. In this case if the owner has the knowledge, and the entry is made by an innocent consignee or agent, the act of the agent or consignee is to be regarded as the act of the guilty principal, and the same penal consequences follow as if the entry had been made by the owner in his own person. As to the evidence to show the foreign value, see also *Cliquot's Champagne*, 3 Wall. 114; *Fennerstein's Champagne*, *Ib.* 145, and cases there cited.

not leave to the agent any discretion as to the persons with whom he may contract for the principal, if he be empowered to make more than one contract. Authority to buy for a principal a single article of merchandise by one contract, or to buy several articles from a person named, is a special agency; but authority to make purchases from any persons with whom the agent may choose to deal, or to make an indefinite number of purchases, is a general agency. And it is not the less a general agency because it does not extend over the whole business of the principal. A man may have many general agents; one to buy cotton, another to buy wheat, and another to buy horses. So he may have a general agent to buy cotton in one neighborhood, and another general agent to buy cotton in another neighborhood. The distinction between the two kinds of agencies is that the one is created by power given to do acts of a class, and the other by power given to do individual acts only. Whether, therefore, an agency is general or special is wholly independent of the question whether the power to act within the scope of the authority given is unrestricted, or whether it is restrained by instructions or conditions imposed by the principal relative to the mode of its exercise.¹

¹ *Butler v. Maples*, 9 Wall. 766. The court applied these principles to the facts in this case. The facts were, that one Shepherd, living in Arkansas, made a purchase of 144 bales of cotton there from the plaintiff, also a resident of Arkansas; Shepherd professing in what he did to act in the name of a firm known as Bridge & Co., of Memphis, composed of the defendants, Butler and Hicox, and others. The cotton was bought as it lay, Shepherd agreeing to pay forty cents a pound for it as soon as it was weighed. Having been weighed, he removed fifty-four bales of it; but ninety bales were burned before it could be placed in a boat to be carried up the river. The fifty-four bales removed were got on board and sent to Bridge & Co., and the plaintiff went to Memphis to see them. He saw Hicox, who wholly denied Shepherd's agency, and refused to pay anything for the cotton that was lost, but agreed to pay fifty cents a pound for the fifty-four bales which had arrived. The plaintiff took this sum, supposing, as he alleged, that the assertions about Shepherd's want of authority were true, and only on that account. Seeing Shepherd afterwards, Shepherd informed him that the assertions were not true; and Butler and Hicox still wholly denying Shepherd's authority to make the contract and to bind the firm, and still refusing to pay for the cotton that was burnt, an action was brought against them to recover the price.

The evidence of Shepherd's authority for the defendants was of two kinds, the first being a written agreement between Bridge & Co. and Shepherd, in which the purpose of the agreement was stated to be the "purchasing R. C. Stone's and such other cotton as said Shepherd may be able to purchase in Desha County, Arkansas, and vicinity, under the conditions and restrictions hereinbefore set forth." The agreement recited that Bridge & Co. had furnished \$4000 to Shepherd, and stipulated that they would furnish him such other money from time to time as might be necessary to purchase said cotton. The agreement further expressed that Shepherd should buy the cotton if it could be bought at the price set forth therein, and as much more as he could on the best possible terms, not paying an average of more than thirty cents per pound for middling cotton, and lower in proportion to the grade. Shepherd was to pay as little as possible on the cotton until it was delivered on a boat, or within protection of a gunboat, and, when thus delivered and paid for, the property was to vest in Bridge & Co., except as to Shepherd's share, amounting to one-eighth of the profits. It was also provided that contracts, shipments, permits, etc., necessary to purchase the cotton and get it to Memphis, should be in Shepherd's name, Bridge & Co. having authority to use it as necessary. The other direct evidence of the agency was

Instructions were given by an insurance company to its agents not to deliver policies to applicants for insurance until the whole

supplied by the testimony of one Martin, a witness for the defendants. He was sent by them to Arkansas with money and instructions for Shepherd, the instructions being that he should purchase cotton for the firm, but was not to agree to pay more than from thirty to thirty-five cents per pound for it. He might make small advances, but he was instructed not to pay the balance of the purchase-money, or make it payable, until the firm should be able to send a boat up the Arkansas river for the cotton, and until it was in their possession, weighed and placed on the boat. He was directed to take no risk for the firm of the destruction of the cotton by incendiaries, or in any other way, except to the extent of the money advanced. On this evidence the charge to the jury was to the following effect: A principal is bound by all that a general agent does within the scope of the business in which he is employed as such general agent; and even if such general agent should violate special or secret instructions given him by his principal, and not disclosed to the party with whom the agent deals, the principal would still be bound if the agent's acts were within the scope of the business in which he was employed, and of his general agency. But a party dealing with a general agent who seeks to hold the principal bound for the agent's acts or contracts, must show, in order to recover, that the agent held himself out as general agent, and that in fact he was such general agent. If Shepherd held himself out as the general agent of Bridge & Co., then the defendants are bound by the contract which he made with the plaintiffs for the cotton, notwithstanding Shepherd may have agreed to pay more for the cotton than his principal had authorized; and if, as general agent for Bridge & Co. to buy cotton in Desha County, Shepherd was not authorized by Bridge & Co. to buy cotton except to be delivered on board the boat, and, in violation of their instructions, he did buy the plaintiff's cotton, and agreed to receive and accept delivery of it elsewhere than on the boat, unless the plaintiff knew of these instructions, the defendants are bound by the contract which Shepherd made, because it was within the scope of his general agency just as much as was the agreement to give for the cotton a larger price than that to which he was limited by the instructions of Bridge & Co.

On the principles above laid down (*ante*, p. 588), the Supreme Court, on

error, held that the agreement created a general agency to buy cotton in Desha County; and it was therefore not error for the court to instruct the jury, as was done, that the agency was a general one, and that the defendants were bound by the contract if Shepherd held himself out as authorized to buy cotton, and if the plaintiff had no knowledge of the instructions respecting the mode in which the agent was required to act.

It will be noticed here that the Supreme Court, in the statement of principles by which they were governed in deciding the case (see *ante*, p. 588), and with which statement of principles we fully concur, do not lay down any such general principle as was done by the court below, that "a party dealing with a general agent who seeks to hold the principal bound for the agent's acts or contracts must show, in order to recover, that the agent held himself out as general agent, and that in fact he was such general agent." As the alleged necessity of showing that the agent "held himself out as general agent" was placing an additional burden on the plaintiff, it was not a matter with which in the case the defendants could find fault. But, as a matter of law, it is not correct. A party may bind his principal by his acts as agent without "holding himself out as a general agent." If an agent contracts for his principal, the fact that he is such agent will bind his principal within the scope of his authority, whether that authority be to act as a general or special agent. If contracting simply as agent, and he has the authority to contract as a general agent, his contract, within the scope of his authority, will bind his principal without his having held himself out as a general agent. And the cases are frequent, as is shown in this Part, where an agent has contracted for a principal, and has not disclosed his agency at all, and on discovery of the undisclosed principal the latter has been held liable on the contracts of one who was his agent in fact, although not holding himself out as such agent at all. And in that case, if the agent were, in fact, the *general* agent of his principal, the principal would be liable on the contract of his general agent, within the scope of his agency, although the fact of such agency, irrespective of its nature, whether general or special, had not been disclosed at all. The court below evidently erred in improperly using the language that, to bind the principal, it must be shown "that the agent held himself as general agent," by

premiums were paid, as the premiums would stand charged to the account of the agents until the premiums were received or the policies were returned to the head office. The Supreme Court of the United States held, that this afforded a strong presumption that the custom was known to the company, and that, where the policy is delivered without requiring payment, the presumption is, especially if it is a stock company, that a credit was intended, and the rule is well settled that, where a credit is intended, the policy is valid though the premium was not paid at the time the policy was delivered, as where credit is given by the general agent, and the amount is charged to him by the company, the transaction is equivalent to payment.¹

One of the principal doctrines connected with the law of principal and agent is that the principal is liable for the acts of his agent within the scope of his employment; the scope of the employment depending on the nature of the employment. This doctrine is well illustrated by *McGowan & Co. v. Dyer*.² In that case the plaintiffs, a limited company, of which C. was managing director, had begun printing a periodical for D. & Co., a firm consisting of the defendant's son and two others, and the periodical was sold on commission by S. The plaintiffs, represented by C., refused to go on printing without a guarantee, and the defendant consented to become security by drawing a bill on D. & Co. and indorsing it to the plaintiffs, upon the understanding that he was to have funds to meet it out of the debt accruing from S. to D. & Co. C. was told of this arrangement. Before the defendant drew this bill, C. had lent money to D. & Co. on his own account, and held their acceptance of his draft. When this latter bill became due, C. obtained an order on S. from the other two partners of D. & Co., without the knowledge or consent of the defendant or his son; and, under this order, C. obtained the amount due from S. to D. & Co., and appropriated it to the payment of this bill, the amount being more than sufficient to cover the defendant's bill. The plaintiffs having sued the defendant on his bill, it was held that the defendant had no defence as against the plaintiffs; for that the plaintiffs were not responsible for what

making a very palpable misapplication of that language. It would have been quite correct — perfectly good law — to have said that one may be the agent (general or special) of another either by being in fact such agent, or by being held out by that other as such agent; but to apply this language, as was done in this case in the court below, and say that one must not only be in fact a general agent, but "must hold himself out as such general

agent," in order to bind his principal, is entirely incorrect.

¹ *Miller v. Life Ins. Co.*, 12 Wall. 285; *Goit v. Insurance Co.*, 25 Barb. 189; *Sheldon v. Atlantic F. & M. Ins. Co.*, 26 N. Y. 460; *Wood v. Insurance Co.*, 32 N. Y. 619; *Bragdon v. Insurance Co.*, 42 Me. 262; *Trustees v. Insurance Co.*, 18 Barb. 69; s. c. 19 N. Y. 305.

² L. R. 8 Q. B. 141.

C. did in getting his private debt paid, as, though he was their managing director, he was not then acting for them or in pursuance of any authority from them.¹

The defendant, who resided at Liverpool, gave to the plaintiffs, who carried on business at Pernambuco, an order to purchase 100 bales of cotton of a specified quality in the following terms: "I beg to confirm my letter of the 23d of February, and hope you will have executed fully all the cotton ordered, and consider still in force. If executed, please regard this as a new order for 100 more." The plaintiffs, acting on this order, purchased in the market and paid for ninety-four bales of the specified cotton. No direct evidence was given as to the then state of the Pernambuco market; but the circumstances of the case rendered it reasonable to infer that the plaintiffs, in purchasing ninety-four bales, had done all that was practicable. The defendant declined to pay for these bales on the ground that his order had been inadequately performed. The Court of Exchequer held, that the order must be construed with reference to the state of market for which it had been given, and that it had been substantially complied with.² It was a question as between principal and agent, and the court treated it as reasonable if the plaintiffs could have purchased the remaining six bales they would have done so, and not to have purchased the ninety-four bales on an order for 100 would have been a breach of their duty as such agents.³

¹ In this case, the act of C., in taking payment of his own debt, being in no way done for the company, or in pursuance of any authority, express or implied, from them, could not affect the rights of the company to recover from the defendant, though the effect of the arrangement might be to make C. liable personally to the defendant. The case was put upon the ground that if goods or funds pledged to a surety were improperly taken by a person acting for himself, the surety would not be discharged where the wrong-doer was a clerk or other agent of the principal creditor, though not acting in any way for his employer when he did the wrongful act, nor in pursuance of any authority, express or implied, from him. See, as to appropriation of funds to pay a debt, *Tibbitts v. George*, 5 A. & E. 107, 115, 116; *Row v. Dawson*, 1 Ves. Sen. 331, 332; *Whitfield v. Fausset*, 1 Ves. Sen. 391; *Malcolm v. Scott*, 3 Hare, 52; *Rodick v. Gandell*, 12 Beav. 329; *Morrell v. Wootten*, 16 Beav. 203; *Burn v. Carvalho*, 4 My. & Cr. 702; *Steele v. Stuart*, L. R. 2 Eq. 84.

² *Johnston v. Kershaw*, L. R. 2 Ex. 82.

³ The court here followed the principle thus laid down in *Story on Agency*,

§ 170: "The principal is not bound by the unauthorized acts of his agent, but is bound where the authority is substantially pursued, or so far as it is distinctly pursued. But the question may often arise whether, in fact, the agent has exceeded what may be deemed the substance of his authority. Thus, if a man should authorize an agent to buy one hundred bales of cotton for him, and he should buy but fifty at one time of one person, and fifty at another time of a different person, or if he should buy but fifty only, being unable to purchase more at any price, or at the price limited, the question might arise whether the authority was well executed. In general it may be answered that it was; because in such a case it would ordinarily be implied, that the purchase might be made at different times, of different persons, or that it might be made of a part only, if the whole could not be bought at all, or not within the limits prescribed." See *Ireland v. Livingston*, L. R. 2 Q. B. 99, to the same effect. But see, as to where the question is between vendor and vendee, *Cross v. Eglin*, 2 B. & Ad. 106; *Tanvaco v. Lucas*, 1 E. & E. 581. An agent employed to make a contract at a particular place has an implied authority to act

A principal is bound by the acts of his agent within the scope of his employment, even though the agent should, in so doing, act in contravention of private instructions given by the principal to the agent. The case of *Paine v. Hutchinson*¹ illustrates this principle. The plaintiffs, dealers in shares, contracted to sell to the agents of the defendant shares which they had purchased from and which remained registered in the name of C. On the settling-day, the agents of the defendant gave his name, as principal, for insertion in the deeds of transfer. Transfers executed by C. to the defendant were delivered to defendant's agents, who paid for the shares out of money given to them by the defendant. The defendant refused to execute the deeds and to procure their registration, on the grounds that he had told his agents that he intended to resell without taking a transfer, and that they had given his name without authority. The defendant had named no other person than himself as purchaser, and, on the purchase being effected, the agents had informed the defendant that they had bought the shares for him, and that they, being called upon to give the name of the purchaser, and being unable to arrange to carry over the purchase as desired by the defendant, were bound by the practice to give, and did give, the defendant's name as transferee. Five months after the sale, the company was ordered to be wound up, and, on bill for specific performance and indemnity (filed before the winding-up), to which C. was not a party, it was held that the plaintiffs were entitled to a decree for specific performance; and that defendant should execute transfers, and procure his name to be registered.

If a person employs another as an agent in a character which involves a particular authority, he cannot by a secret reservation divest him of that authority; and it will be taken that the agent has authority to do whatever is necessarily incidental to carrying on the business for which he is employed. Thus, where A. employed B. to manage his business, and to carry it on in the name of "B. & Co.," the drawing and accepting bills of exchange was incidental to the carrying on of such a business, but it was stipulated between them that B. should not draw or accept bills. B. having accepted a bill in the name of "B. & Co.," A. was liable on the bill in the hands of an indorsee, who took it without any knowledge of A. and B., or the business.²

according to the usage of that place, and knowledge of the usage on the part of the principal is immaterial. *Sutton v. Tatham*, 10 A. & E. 27; *Bayliffe v. Butterworth*, 1 Ex. 425; *Pollock v. Stables*, 12 Q. B. 765. See further as to usage, *Inse v. Pompe*, 8 C. B. n. s. 538; *Trueman v.*

Loder, 11 A. & E. 589; *Kirchner v. Verms*, 12 Moo. P. C. 361; *Sweeting v. Pearce*, 9 C. B. n. s. 534.

¹ L. R. 3 Eq. 257.

² *Edmunds v. Bushell & Jones*, L. R. 1 Q. B. 97.

An auctioneer who is authorized to sell goods on the conditions that purchasers shall pay a deposit at once, and the remainder of the purchase-money to the auctioneer on or before delivery of the goods, has no authority to receive payment by a bill of exchange, and such payment will not discharge the purchaser.¹

Moneys having been borrowed by the agent of a company in the name and for the use of his principal, and the principal, having been informed of such borrowing, and of the amounts, and, a demand having been made to him for the payment thereof, having failed within a reasonable time thereafter to disavow the acts of his agent in so borrowing the money, in an action for the money the jury would be authorized to consider the principal as having assented to what was done in his name.²

Where, in making a contract, the principal is disclosed, and the agent is known to be acting as such, the latter cannot be made personally liable unless he agreed to be so.³

If a principal knows that a stranger is dealing with his agent under the belief that all statements made by the agent were warranted by the principal, and, so knowing, allowed the stranger to expend money in that belief, and this knowledge is brought home to the principal, a court of equity will not afterwards allow the principal to set up want of authority in the agent.⁴

¹ Williams v. Evans, L. R. 1 Q. B. 352; Sykes v. Giles, 5 M. & W. 645. See as to agents generally receiving payment for their principals, Barker v. Greenwood, 2 Y. & C. Ex. 414. In Thorold v. Smith, 14 Mod. 87, where a payment was made in the city by a goldsmith's note to a servant sent by his master to receive money, Holt, C. J., said he thought it more a matter of evidence than of law, and any jury in Guildhall would find payment by a bill to be good payment; it being the common practice in the city.

² Gold Mining Co. v. National Bank, 96 U. S. 640; Vianna v. Barclay, 3 Cow. 281; Hazard v. Spear, 4 Keyes, 469; Cairnes v. Bleecker, 12 Johns. 300.

³ Whitney v. Wyman, 101 U. S. 392. In this case the court say: "Where the question of agency in making a contract arises, there is a broad line of distinction between instruments under seal and stipulations in writing not under seal, or by parol. In the former case the contract must be in the name of the principal, must be under seal, and must purport to be his deed and not the deed of the agent covenanting for him. Stanton v. Camp, 4 Barb. 274. In the latter cases the question is always one of intent, and the court, being untrammelled by any other consideration, is bound to give it

effect. As the meaning of the lawmaker is the law, so the meaning of the contracting parties is the agreement. Words are merely the symbol they employ to manifest their purpose that it may be carried into execution. If the contract be unsealed and the meaning clear, *it matters not how it is phrased, nor how it is signed, whether by the agent for the principal or with the name of the principal* by the agent, or otherwise." It will be observed that this exactly accords with what we have expressed in our comments on the English cases, which, as a whole, are so badly decided. The proper principle, as above stated by the United States Supreme Court, has been lost sight of by the English courts in many of their decisions, which has led to the confusion in which those cases are involved, and which, by our comments, we have endeavored to clear away.

⁴ Ramsden v. Dyson, L. R. 1 H. L. 129. This is on the ground of acquiescence, which has been acted on in a great variety of cases, and held conclusive even against the requirements of statutes, as the Statute of Frauds. See Gregory v. Mighell, 18 Ves. 328; Earl of Oxford's Case, 1 Ch. Rep. 1; Mundy v. Jolliffe, 5 My. & Cr. 167; Pain v. Coombs, 3 Sm. & G. 449; 1 De G. & J. 34; Lillie v. Legh, 3 De G.

Where an insurance broker in Liverpool had an authority to underwrite for his principal for not exceeding £100 on any one vessel, and, without his knowledge, underwrote for £150, it was held, that, as it is notorious that there is an undisclosed limit in nearly all such cases, the principal was not liable for the £150, and as the contract was not divisible he was not liable for the £100.¹

The knowledge of the attorney of a collection agency of the insolvency of the debtor was held not to affect the creditors who had sent their accounts to the collection agency, and who had not received the money collected by the attorney within the four months provided for in the statute; the attorney being the agent of the collection agency, and not of the creditors.² But where an

& J. 204; *Shillibeer v. Jarvis*, 8 De G. M. & S. 79; *Powell v. Lovegrove*, *Id.* 357; *Farrall v. Davenport*, 3 Giff. 363; *Allan v. Bower*, 3 Bro. C.C. 153, 189; *East India Co. v. Vincent*, 2 Atk. 83; *Pilling v. Armitage*, 12 Ves. 78; *Stiles v. Cowper*, 3 Atk. 692; *Daun v. Spurrier*, 7 Ves. 231; *Unity Bank v. King*, 25 Beav. 72; *Surcome v. Pinniger*, 3 De G. M. & G. 571; *Dowell v. Dew*, 1 Y. & C. Ch. 345; *Shannon v. Brudstreet*, 1 Sch. & L. 52; *Storrs v. Barker*, 6 Johns. Ch. 68, 169; *Green v. Bidelle*, 8 Wheat. 1, 77; *Bright v. Boyd*, 1 Story, 492; *Wendell v. Van Renssallaer*, 1 Johns. Ch. 354; *Brig Sarah Ann*, 2 Sumn. 206; *Gray v. Bartlett*, 20 Pick. 193; *Henderson v. Overton*, 2 Yerg. 394; *Tarrant v. Terry*, 1 Bay, 239; *Skinner v. Stouse*, 4 Mo. 93.

¹ *Barnes v. Ewing*, L. R. 1 Ex. 320. *Martin, B.*, said: "The contract declared on was made by an agent for his principal, and it was therefore necessary to prove his authority. Now its terms are as follows: 'I hereby authorize you, in my name and on my behalf, to underwrite policies of insurance against marine risks not exceeding £100 by any one vessel;' and that document is produced to prove the declaration which alleges that a policy was subscribed for £150. If the case had stood there the agent would certainly have been unauthorized. But then it is said that we must hold him to have had authority because of the exigencies and course of business at Liverpool. It appears, however, that it was well known there that a limit is almost always, if not always, put to the amount for which a broker may underwrite. The limit in a particular case is known, it is true, only to the principal and the broker; but still every one has notice that there is a limit of some sort; and I think, therefore, it would be impossible to hold a person lia-

ble to an unlimited extent, or to an extent beyond the fixed limit." *Story on Agency*, 4th ed. § 131, where it is said that if factors who possess a general authority to sell, violate their private instructions, the principal is none the less bound, was relied on. But *Bramwell, B.*, answered: "With regard to the passage cited from *Story*, the case referred to by no means warrants the general proposition laid down, and I doubt exceedingly whether the principal of a factor would be liable in a case where the factor sold in spite of a particular authority to sell at a particular price. There it is said that business could not be carried on if, before accepting a policy for a certain amount, the assured were always to insist on the agent underwriting it showing his authority to sign for that amount. The answer to that objection is that as a rule, reliance may be placed on the honesty of the broker and the solvency of the principal. It is unusual in business transactions for agents to assume an authority they do not possess." And *Channel, B.*: "If we look only at the express authority, it not only does not confer, it even negatives, any authority to sign a policy for so much as £150. But then, it is said, the authority was given to a 'general' agent and cannot be limited by secret instructions as to amount. Now I agree that to be a general agent a man need not be an agent for all purposes. He may be a general agent for a special purpose, for example, an agent to sign all bills of exchange. But here it is well understood that there is some limit beyond which a broker may not underwrite policies, and that being so, the broker is not, in my opinion, a general agent in the sense contended for."

² *Hoover v. Wise*, 91 U. S. 308; *Reeves v. The State Bank*, 8 Ohio St. 465; *Mackay v. Ramsay*, 9 Cl. & Fin.

agent has power to employ a sub-agent, the acts of the sub-agent, or notice given to him in the transaction of the business, have the same effect as if done or received by the principal.¹

Where, in the absence of fraud, C., who was authorized to sell A. and B.'s share of property which belonged jointly to them and C., for \$200,000, which sale was effected by C.; he at the same time selling his own moiety for \$300,000, the court held, reversing the decision of the court below, that if A. and B. gave their consent in advance of any sale, it was immaterial to them what price C. got for his share of the property, and he was under no obligation to disclose the price to A. and B., and to ask their consent to retain it. The court below was in error in holding that after this antecedent assent, a subsequent assent was necessary.²

The plaintiff sued for goods sold and delivered. The defendant pleaded that the goods were sold to him by one A., whom the defendant believed to be the principal; and that, before the defendant knew that the plaintiffs were the principals, the said A. became indebted to the defendant in a sum of \$400, which he, the defendant, was willing to set off against the plaintiff's claim. The jury found a verdict for the defendant on this plea. Held, that the defendant, having purchased the goods without notice of A.'s being an agent, and A. having sold them in his own name, could set off the debt due to him from A. personally, in the same way as if A. had been the principal.³

818; *The Montgomery Co. Bank v. The Albany City Bank*, 3 Seld. 459; *The Commercial Bank of Pa. v. The Union Bank of New York*, 1 Kern. 203; *Allen v. Merchants' Bank*, 22 Wend. 215; *Bradstreet v. Evesson*, 72 Pa. St. 124; *Lewis v. Wallace*, 10 Ala. 142; *Cobb v. Becke*, 6 A. & E. 930.

¹ *Storrs v. City of Utica*, 17 N. Y. 104; *Boyd v. Vandenberg*, 1 Barb. Ch. 273; *Rourke v. Story*, 4 E. D. Smith, 54; *Lincoln v. Battle*, 6 Wend. 475.

² *Ranney v. Barlow*, 112 U. S. 207. See *Adams v. Roberts*, 2 How. 486; *Reese v. Beck*, 24 Ala. 651; *Grube v. Nichols*, 36 Ill. 92; *Chappell v. Allen*, 38 Mo. 213, 220. An agent who discovered a defect in the title of his principal, and made use of his information to acquire a valid legal title for himself, was held to be a trustee for his principal. *Ringo v. Binns*, 10 Peters, 169.

Where an agent is dealt with as principal, and there are no circumstances of equity to prevent the operation of the statute of limitations in favor of the latter, if the statute is a bar to a claim against the agent, it will be equally so as to the

principal; the mere ignorance of the other contracting party, and even the concealment of the fact that the agent was merely the agent of the undisclosed principal, no fraud on the part of the latter being charged, is insufficient to raise such an equity. *Ware v. Galveston City Company*, 111 U. S. 170.

³ *Bowmanville Machine Co. v. Dempster*, 2 S. C. of Can. R. 21. So, in England, in *Ex parte Dixon*, 4 Ch. Div. 133, it has been held that a person purchasing goods from a factor who sells them in his own name, can set off a debt due to him from the factor personally in the same way as if the factor were the principal, unless the purchaser has notice that the factor is not the principal; and this right is not affected by the fact that the factor in selling in his own name without disclosing the agency is acting in contravention of the express directions of his principal. See *Rabone v. Williams*, 7 T. R. 360; *George v. Clagett*, 7 T. R. 359. But in *Fish v. Kempton*, 7 C. B. 687, where A. bought goods of B., knowing that B. was selling them as factor; it was held that A. could not, in an action by the principal for the price, set off a

In *Irwan v. Williar*,¹ the case was brought within the decision of *Robinson v. Mollet*.² The court in *Irwan v. Williar*, said.

debt due to him by B., although it was found that A. made the purchase *bonâ fide*; but *scilicet*, that payment to B., though made prematurely, would, if made *bonâ fide*, bind the principal. And in *Semenza v. Brinsley*, 18 C. B. N. s. 467, it was held that one who buys goods of a person whom he knew to be selling them as an agent, could not set off in an action by the principal for their price a debt due to him from the agent, even though he did not know at the time of the purchase, and had not the means of knowing, who was the real owner. There, to an action for goods sold and delivered, the defendants pleaded, that the goods were sold to them by one Moll, then being the agent of the plaintiffs and intrusted by them with the possession of the goods as apparent owner thereof; that Moll sold them in his own name and as his own goods, with the consent of the plaintiffs; that the defendants, at the time of the sale and delivery of the goods, did not know and had not the means of knowing that the plaintiffs were the owners of the goods, or that Moll was their agent; and that, at the time of the said sale and delivery of the goods, and before the defendants knew that the plaintiffs were the owners of the goods, or that Moll was the plaintiffs' agent, Moll became and continued indebted to the defendants for goods sold, etc., to an equal amount, which they were willing and offered to set off. Held, a bad plea, for not averring that the defendants did not know and had not the means of knowing that Moll at the time he sold the goods to them was a mere agent. This case has been considered and explained in *Ex parte Dixon*, 4 Ch. Div. 133, 137, and the proper distinction pointed out so far as it applies to *factors* intrusted with the possession as well as the disposition of the property. Referring to the law as laid down by Willes, J., in *Semenza v. Brinsley*, 18 C. B. N. s. 467, Brett, J. A., says: "Mr. Justice Willes, who had the greatest experience in mercantile law, says that the ordinary course of business is for factors (that is to say, persons who are so entrusted with goods) to sell in their own name. Now, the rule of law is, that the extent of an agent's authority as between himself and third parties is to be measured by the extent of his usual employment. That being so, the very fact of intrusting your goods to a man as a factor, with right to sell them, is *primâ facie* authority from you to him to sell in his own name.

Therefore, it not having been shown here that any limitation of that authority was made known to the person who was dealing with the agent, there is sufficient evidence, as between the principal and such third party, that the goods were to be sold by the agent in his own name as principal, with the authority of the person who so intrusted him with the goods. That point, therefore, is made out. It is true that Mr. Justice Willes, in *Semenza v. Brinsley*, states it to be necessary that the agent should have the authority of the principal for selling in his own name; but he was only dealing with a demurrer to a plea; and at the end of the judgment he says it was a great pity that the parties did not go on to try the facts; and if the facts had been tried, I have no doubt that as soon as he found that the agent was entrusted with the goods as a factor, he would have held that that proved authority given to him by the principal to sell in his own name, so far as anybody was concerned to whom some limitation of that authority was not disclosed. It therefore is made out that the agent sold in his own name with the authority of the principal." And it was conceded, as held in *Semenza v. Brinsley*, 18 C. B. N. s. 467, that it was then necessary to show that the person dealing believed that the agent was the principal in the transaction. *Ex parte Dixon*, 4 Ch. Div. 133, 138. In *Semenza v. Brinsley*, at p. 477, Willes, J., in considering the plea in that case, said: "It is necessary to consider whether the averments in this plea satisfy the conditions under which a set-off of a debt due from a factor against a claim for the price of the goods by his principal is allowed. The rule of law is well stated in the marginal note to the case of *George v. Clagett*, 7 T. R. 359; viz., that, if a factor sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor against the demand for the goods made by the principal. One may observe, as has often been suggested, and as was very clearly pointed out by Holroyd, J., in *Carr v. Hinchliff*, 3 B. & C. 547, that the difficulty was, not in setting up as a defence against the principal that which would be a defence against the factor, by way of extinguishment of the claim of the former, but in applying the statute of set-offs, and saying that the terms of that statute were satisfied, so as to say that the debt of the factor should

¹ 110 U. S. 499.

² L. R. 7 H. L. 802.

"The ground of the action is that the plaintiffs, at the request of the defendants, had made certain contracts for the sale and future delivery of grain; that these contracts were made in the name of the brokers, the plaintiffs, on which, therefore, they were personally liable, but in which the defendants were the principals; that the latter were bound to perform them, or to place in the hands of their brokers means of performance within the proper period, or to indemnify them against the consequences of non-performance; that the defendants in all these particulars became in default, and the plaintiffs were required to perform out of their own means; which they did by purchasing grain for delivery at the market price, or paying the difference between that and the contract price. The custom proved was offered to show this performance and consequent loss; and in doing so, it disclosed that the brokers did not perform the original contracts of sale actually made, but delivered equal quantities of grain or its market value, in fulfilment of contracts of purchase made by them for others, and which, by the process of mutual exchange, authorized by this custom, had come into their hands for that purpose. This exchange and substitution, and payment of differences to effect it, working as it does a complete change in the nature of the seller's rights and obligations, cannot be made without his assent, and that assent can be implied only from knowledge of the custom which it is claimed authorizes it." The United States Supreme Court held, that the court below erred in permitting proof of such custom, without evidence that the defendants had knowledge of it, and in not instructing the jury to disregard it, if they were satisfied from the evidence that such knowledge had not been satisfactorily shown.¹

Under the Act of July 13, 1866, a tax was imposed on all *sales* of any goods, wares, or merchandise, made by commercial brokers.

for the purpose of the action be considered as the debt of the principal. That difficulty, however, was got over, and the factor and the principal were identified by that decision, for the purpose of the statute; and it was held that the existence of the set-off, without any knowledge of the agency, entitled the debtor to set up as against the principal the defence of set-off as a *quasi* extinguishment, notwithstanding the words of the statute of set-off." See, also, *Purchell v. Salter*, 1 Q. B. 197; *Sims v. Bond*, 5 B. & Ad. 389; *Baring v. Corrie*, 2 B. & Ald. 137; *Maanss v. Henderson*, 1 East, 335; *Moore v. Clementson*, 2 Camp. 22; *Warner v. McKay*, 1 M. & W. 591; *Smart v. Sandars*, 3 C. B. 399; *Norwood v. Dresser*, 14 C. B. n. s. 574; 17 C. B. n. s. 466

¹ See *Brown v. Byrne*, 3 El. & B. 703; *Grissell v. Bristowe*, L. R. 4 C. P. 36; *Humfrey v. Dale*, 7 El. & B. 266; *E. B. & E. 1004*; *Bostock v. Jardine*, 3 H. & C. 700.

Parties offering to sell property for \$40,000 cash are not bound to their agent for selling, to carry out such sale, where an offer of a larger sum is made to the agent with the condition that \$10,000 shall be paid in cash, which is to be forfeited by the purchasers if they do not complete the purchase. \$40,000 paid by the purchasers is the only valid acceptance of the offer which will bind the parties offering the property for sale. *Still v. Huidekopers*, 17 Wall. 384.

Under this act a tax was assessed against the respondents, cotton brokers of New Orleans, which they were compelled to pay; their appeal to the commissioner of internal revenue against the tax having been dismissed. In an action by them against the collector, it was shown that they did not sell any cotton or other goods, but limited themselves to making purchases for those who required their services; that the money was paid by their principals directly to the parties who made the sales, and that their compensation for making the purchases was one-half of one per cent., paid by the buyer, and one-fourth of one per cent. by the seller, under a custom of the trade in New Orleans, established when cotton brokers were sellers as well as buyers, which custom was continued after the brokers buying had ceased to be sellers. It was also shown that a tax on all the sales for which the respondents had been assessed, had been paid by other parties who had made the sales. The Supreme Court, in an action against the collector, affirming the judgment of the Circuit Court for Louisiana, held that the tax had been wrongly assessed and collected.¹

4. OFFICERS OF COMPANIES AS AGENTS.

Where the agent, within the scope of his employment, knowingly makes a false representation, both he and his principal are principals in the commission of the fraud, and are both liable. *Swift v. Winterbotham and Goddard*² is an illustrative case. The plaintiff sued W. and G. jointly for a false representation with respect to the solvency of R. The defendant W. was sued as a public officer of a banking company, formed under 7 Geo. 4, c. 46, and the defendant G. was the manager at one of their branches. The plaintiff was a customer of the S. bank, and requested the manager of that bank to inquire for him as to R.'s credit. The manager wrote a letter addressed to "the manager" of the defendants' banking company, requesting information whether R. was responsible to the extent of £50,000. The defendant G. wrote a letter, which he signed as manager, giving a favorable reply as to R.'s responsibility. The plaintiff, in consequence of this letter, supplied R. with goods, for which he never was paid, in consequence of R.'s insolvency. The statement made by G. was false to his knowledge. The defendants' banking company had no knowledge, otherwise than through G., that such a letter had been written, and gave him no express authority to write the letter, but the writing of such a letter was an act done within the scope of the general authority conferred on G. as manager. It

¹ *The Collector v. Dodswell*, 16 Wall. 156. ² L. R. 8 Q. B. 244.

was, among other things, held, that inasmuch as it is usual for the customers of a bank to make inquiries like that made by the plaintiff, it must be taken to have been within the contemplation of the defendants that the inquiry as to R.'s solvency might have been made on behalf of a customer of the S. bank, and that the representation might be communicated to him; that the banking company and G. were liable to the plaintiff, he being the customer who had made the inquiry; and that the banking company was liable for the false representation of its manager, made in the course of conducting the business of the bank.¹

A bill of exchange purporting to be made at the office of a company, and directing the drawee to charge the amount thereof to the account of the company, of which the signers describe themselves as president and secretary, bearing on its face all these signs of being the contract of the company, the principal, cannot be held to bind the agents personally.²

¹ In this case Lord Tenterden's Act (9 Geo. 4, c. 14, § 6), "That no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealing of any other person to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith," was relied on. The court held that, in an ordinary case of principal and agent, a written representation within this section, signed by the agent alone, would not be binding on the principal, although such signature was duly authorized by him. *Hyde v. Johnson*, 2 Bing. N. C. 776; *Clark v. Alexander*, 8 Scott's N. R. 147; *Torr's v. Cuming*, 7 M. & G. 88; *Scott v. Eastern Counties Ry. Co.*, 12 M. & W. 33; *Kingsford v. Great Western Ry. Co.*, 16 C. B. n. s. 761; *Jessel v. Bath*, L. R. 2 Ex. 267; *Richardson v. Younge*, L. R. 6 Ch. 478. But the court held that signing as manager for the banking company was, in fact, the signing, not merely of an agent, but of the banking company itself, and, therefore, the signature was that of the party to be charged within the section. And although the statement was not made directly to the plaintiff, it must be considered that it was within the contemplation of the defendants when the representation was made, that it would or might be communicated to the customer of the bank on whose behalf the information is sought. Where that is done, and the person to whom the false representation is thus

communicated acts on it and suffers damage thereby, he is entitled to maintain an action for such damage in the same manner as if the representation had been made directly to himself; *Langridge v. Levy*, 2 M. & W. 519; *Bedford v. Bagshaw*, 29 L. J. Ex. 65; the banking company being liable for the fraudulent representation of its manager made in the course of conducting the business of the company. *Barwick v. The English Joint Stock Bank*, L. R. 2 Ex. 259. Where the action is in tort, all persons liable for the commission of the tort, whether principals, agents, or servants, are liable to be sued jointly. In *Cullen v. Thompson's Trustees*, 4 Macq. 424, Lord Westbury says: "All persons directly concerned in the commission of a fraud are to be treated as principals; no party can be permitted to excuse himself on the ground that he acted as the agent or as the servant of another." But where the fraud is that of the agent alone, and not that which the company has impliedly authorized him to be guilty of, there the company is not liable for the deceit. *Western Bank of Scotland v. Addie*, L. R. 1 Sc. & D. 145; *National Exchange Co. v. Drew*, 2 Macq. 103; *Ranger v. Great Western Ry. Co.*, 5 H. L. C. 72; *D'Arcy v. Tamar, etc. Ry. Co.*, L. R. 2 Ex. 158; *Barry v. Croskey*, 2 J. & H. 1; *Pilmore v. Hood*, 5 Bing. N. C. 97; *Pasley v. Freeman*, 3 T. R. 51; *Blackmore v. Bristol & Exeter Ry. Co.*, 8 E. & B. 1035.

² *Hitchcock v. Buchanan*, 105 U. S. 416; *Sayre v. Nichols*, 7 Cal. 535; *Carpenter v. Farnsworth*, 106 Mass. 561; *Tripp v. Swanzy Paper Co.*, 13 Pick.

Where checks by a mining company against their funds in a bank were, for a long period, signed by the president and secretary of the company, without objection by the company, the bank had a right to presume that they were properly signed, and to recover against the company for an overdraft so signed; the bank having the right to presume that these officers did not exceed their authority, and that the moneys thus obtained were paid over to or received by the company. But, as this is a mere presumption arising from the conduct of the parties, as well as from the general mode in which corporations organized for profit conduct their business, if not, under the special circumstances of the case, conclusive, it may be overthrown by proof of want of authority, express or implied, and that the company did not receive the money paid on such overdraft.¹

Corporations are liable for the acts of their servants while engaged in the business of their employment, in the same manner and to the same extent that individuals are liable under like circumstances.²

291; *Fuller v. Hooper*, 3 Gray, 334; *Bank of British North America v. Hooper*, 5 Gray, 567. In *Slawson v. Loring*, 5 Allen, 340, 343, Bigelow, C. J., said: "No one can doubt that on bills thus drawn the agent fully discloses his principal, and that the drawer could not be personally chargeable thereon."

¹ *Mining Company v. Anglo-Californian Bank*, 104 U. S. 192. The officers, *de facto*, of a company holding under color of an election, having charge of the affairs of the company, are capable of binding it in all matters legitimately devolving upon directors of the company. *Anglo-Californian Bank v. Mahoney Mining Co.*, 5 Sawyer, 255, 258. Bankers are bound by notice communicated to their cashier of stock-certificates received by them being trust property. *Duncan v. Laudon*, 15 Wall. 165, 177.

² *Merchants' Bank v. State Bank*, 10 Wall. 604, 645; *Ranger v. The Great Western Ry. Co.*, 5 H. of L. Cas. 86; *Thayer v. Boston*, 19 Pick. 511; *Frankfort Bank v. Johnson*, 24 Me. 490.

Where a party deals with a corporation in good faith, the transaction not being *ultra vires*, and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. And if the contract can be valid under any circumstances, an innocent party in such a case has a

right to presume their existence, and the corporation is estopped to deny them. *Supervisors v. Schenck*, 5 Wall. 784; *Knox Co. v. Aspinwall*, 21 How. 539; *Bissell v. Jeffersonville*, 24 How. 288; *Moran v. Commissioners*, 2 Black, 722; *Gelpcke v. Dubuque*, 1 Wall. 203; *Mercer Co. v. Hackett*, *Ib.* 93; *Mayor v. Lord*, 9 Wall. 414; *Royal British Bank v. Turquand*, 6 E. & B. 327; *The Farmers' Loan & Trust Co. v. Curtis*, 3 Seld. 466; *Stoney v. American Life Ins. Co.*, 11 Paige, 635; *Society for Savings v. New London*, 29 Conn. 174; *Commonwealth v. The City of Pittsburgh*, 34 Pa. St. 497; *Commonwealth v. Allegheny Co.*, 37 Pa. St. 287. And corporations are liable for every wrong of which they are guilty, and in such cases the doctrine of *ultra vires* has no application. *Philadelphia & Baltimore R. R. Co. v. Quigley*, 21 How. 209; *Green v. London Omnibus Co.*, 7 C. B. N. S. 290; *Life & Fire Ins. Co. v. Mechanic Fire Ins. Co.*, 7 Wend. 31. A cashier of a bank has the power *virtute officii* to certify checks. It is his duty to receive all the funds which come into the bank, and to enter them upon its books. The authority to receive implies and carries with it authority to give certificates of deposit and other proper vouchers. Where the money is in the bank he has the same authority to certify a check to be good; charge the amount to the drawer; appropriate it to the payment of the check, and make the proper entry on the books of the bank. The power is inherent in the office. *Wild v. The Bank*

A contract entered into between "W., superintendent of the K. Mining Co., parties of the first part," with P., and signed, "W., Sup. K. Mining Co.," was held, under the civil code of Dakota of 1877,¹ — which provides that "any instrument within the scope of his authority, by which an agent intends to bind his principal, does bind him, if such intent is plainly inferable from the instrument itself," — to be a contract made by W. for the mining company, it clearly appearing upon its face to have been intended to bind, and that, therefore, it did bind the company, and the defendant as one of its members.²

The cashier of a bank is not presumed to have power, by reason of his official position, to bind his bank as an accommodation indorser of his own promissory note. Such a transaction would not be within the scope of his general powers; and one who accepts an indorsement of that character, if a contest arises, must prove actual authority before he can recover. There are no presumptions in favor of such a delegation of power. The very form of the paper itself carries notice to a purchaser of a possible want of power to make the indorsement, and is sufficient to put him on his guard. If he fails to avail himself of the notice, and obtain

of Passamaquoddy, 3 Mason, 506; Burnham v. Webster, 19 Me. 234; Elliot v. Abbot, 12 N. H. 556; Bank of Vergennes v. Warren, 7 Hill, 91; Lloyd v. The West Branch Bank, 15 Pa. St., 172; Badger v. The Bank of Cumberland, 26 Me. 423; Bank of Kentucky v. The Schuylkill Bank, 1 Pars. Sel. Cas. 182; Fleckner v. Bank of the United States, 8 Wheat. 338. The directors may limit his authority as they deem proper, but this would not affect those to whom the limitation was unknown. Commercial Bank of Lake Erie v. Norton, 1 Hill, 501; Bank of Vergennes v. Warren, 7 Hill, 94; Beers v. The Phoenix Glass Co., 14 Barb. 358; Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank, 14 N. Y. 624; North River Bank v. Aymar, 3 Hill, 262, 268; Barnes v. Ontario Bank, 19 N. Y. 156, 166. Those dealing with a bank in good faith have a right to presume integrity on the part of its officers, when acting within the apparent sphere of their duties, and the bank is bound accordingly. Mead v. The Merchants' Bank of Albany, 25 N. Y. 146; Barnes v. The Ontario Bank, 19 N. Y. 156; Farmers' & Mechanics' Bank v. The Butchers' & Drovers' Bank, 14 N. Y. 624; 16 N. Y. 133. Acts of the cashier of a bank, done in the ordinary course of the business actually confided to such an officer, are *prima facie* evidence that they fell within the scope of his duty. Fleckner v.

Bank of the United States, 8 Wheat. 338.

¹ § 1373.

² Post v. Pearson, 108 U. S. 418. See Whitney v. Wyman, 101 U. S. 392; Hitchcock v. Buchanan, 105 U. S. 416; Goodenough v. Thayer, 132 Mass. 152; Tucker Manuf. Co. v. Fairbanks, 98 Mass. 101; Fuller v. Hooper, 3 Gray, 334; Lyon v. Williams, 5 Gray, 557; Slawson v. Loring, 5 Allen, 340; Carpenter v. Farnsworth, 106 Mass. 561; Cutler v. Ashland, 121 Mass. 588. But there are cases in this country as in England, where the parties describing themselves as agents have been held liable as principals to the contract, the term "agent" being held, in such cases, to be merely *descriptio personarum*. Simonds v. Heard, 23 Pick. 120; Tippetts v. Walker, 4 Mass. 595; Packard v. Nye, 2 Met. 47; Bank of British North America v. Hooper, 5 Gray, 567; Morrell v. Coddington, 4 Allen, 403; Seaver v. Cushman, 10 Cush. 324; Fiske v. Eldridge, 12 Gray, 474; Stone v. Wood, 7 Cow. 453; Bank v. Monteath, 1 Den. 402; Duvall v. Craig, 2 Wheat. 45; Foster v. Fuller, 6 Mass. 58; White v. Skinner, 13 Johns. 307; Elwell v. Shaw, 16 Mass. 42; Smith v. Morse, 6 Wall. 76, 83; Jones v. Littledale, 6 A. & E. 486; Magee v. Atkinson, 2 M. & W. 440; Higgins v. Senior, 8 M. & W. 834; Appleton v. Binks, 5 East, 148.

the information which is thus suggested to him, it is his own fault, and, as against an innocent party, he must bear the loss.¹

Where a note is signed by the cashier of a bank for a loan made, it is open to both of the parties to show that the loan was, in fact, made to the bank, and that the note was really made as the obligation of the bank.²

By the articles of association of a telegraph company it was provided that three directors should be the quorum necessary for the transaction of business; and the directors were empowered, in their discretion, to sell all or any one or more of the company's lines of telegraph, grants, licenses, powers, ways, way-leases, easements, privileges, engagements, or contracts, or any part of its good-will, estates, property, or interest therein, upon such terms and conditions as they should deem expedient; and also at their discretion to appoint agents, any such agent to be remunerated at the discretion of the directors. The company resolved to sell their undertaking to the Postmaster-General, and in July, 1869, a letter was written, addressed to C., appointing him to act as agent for the directors in the matter of the sale, and agreeing that if he succeeded in obtaining from the Postmaster-General the sum of £20,000 or upwards, his commission should be £25 per cent. The letter concluded by saying: "We engage to sign a legal obligation to the above effect, when called upon to get the signatures of our brother directors." This letter was written in C.'s office, and there signed by two of the directors and handed to C., who forwarded it to a third director in the country, by whom it was returned to C., confirmed and signed by himself and a fourth director. This agreement, though not appearing to have been resolved upon or confirmed at any meeting of directors, was

¹ *West St. Louis Savings Bank v. Shawnee County Bank*, 95 U. S. 557. Under the Internal Revenue Act of 1864 (13 Stat. at Large, 277) a duty was imposed on the capital, etc., of bankers, by section 110 of the act; and by section 79 of the act bankers were required to pay for a license to carry on the business; and bankers were defined to be those who received deposits payable on check, etc., who loaned on stocks, bills, etc., or who received stocks, bills, etc., for discount or sale. By act of March 3, 1865 (13 Stat. at Large, 252, 472), amending the prior act, it was provided that brokers should pay for a license; and, defining a broker under the act, it was further provided "that every person, firm, or company, except such as hold a license as a banker, whose business it is as a broker to negotiate purchases or sales of stocks, bills, etc., for themselves or others, shall be regarded as

a broker under this act, provided that any person holding a license as a banker shall not be required to take out a license as a broker." By section 99 of the amending act both brokers and bankers who were "doing business as brokers" were made liable to a special tax upon all sales of stocks, etc. The plaintiffs, having been taxed as bankers under section 79 of the original act, claimed that they were not liable for the tax under section 99; but the Supreme Court of the United States, affirming the judgment of the Circuit Court, held that, under the express language of section 99, as the plaintiffs were "bankers doing business as brokers," they were liable for the tax. *Warren v. Shook*, 91 U. S. 704. And see *United States v. Fisk*, 3 Wall. 445; *United States v. Cutting*, *Id.* 441; *Clark v. Gilbert*, 5 Blatch. 330.

² *Bank v. Kennedy*, 17 Wall. 19; *Baldwin v. The Bank of Newbury*, 1 Wall. 240.

referred to at a subsequent meeting of shareholders, and not repudiated; but no such legal obligation as referred to in the letter was executed. The sale having been effected through C.'s agency for a sum of more than £20,000, it was held, that the agreement was not *ultra vires*, and that, though informal according to the internal regulations of the company, it was binding against the company in favor of a person dealing with them; consequently, that C. was entitled to commission at the rate of 25 per cent.¹

In *Moore v. Citizens' National Bank of Piqua*,² the cashier of the bank, fraudulently, for money lent to him, signed a certificate in favor of the plaintiff for stock of the bank. In an action against the bank for the value of the stock, the bank having refused to recognize the certificate as valid, the Supreme Court sustained the holding of the court below, and held that the plaintiff having dealt with the cashier personally, and not with the bank, the money having been lent to him for his private use, his representations to her were made by him personally, and not as cashier; and that the circumstances otherwise were such as to prevent her from being an innocent holder of the certificate, which had been issued in fraud of the bank.³

The declarations made by an officer or agent of a corporation in response to timely inquiries properly addressed to him, and relating to matters under his charge, in respect to which he is

¹ *In re Barelli's Telegraph Co.*, Collier's Claim, L. R. 12 Eq. 246. See *Reuter v. Electric Telegraph Co.*, 6 E. & B. 341, 348; *Totterdell v. Fareham Brick & Tile Co.*, L. R. 1 C. P. 674; *Bargate v. Shortridge*, 5 H. L. Cas. 297, 318; *In re Barnard's Banking Co.*, L. R. 3 Ch. 105; *In re County Life Assur. Co.*, L. R. 5 Ch. 288; *Agar v. Athenæum Life Assur. Society*, 3 C. B. N. S. 725; *D'Arcy v. Tamar Ry. Co.*, L. R. 2 Ex. 158.

² 111 U. S. 156.

³ A person who takes such a security with knowledge that the conditions on which alone the security was authorized were not fulfilled is not protected, and in his hands the security is invalid, though the imperfection is in some matter relating to the internal affairs of the corporation, which would be unavailable against a *bona fide* holder of the same security. *Hackensack Water Co. v. De Kay*, 9 Stew. N. J. 548, 565; *Merchants' Bank v. State Bank*, 10 Wall. 604, 644; *Wright's Appeal*, 99 Pa. St. 425. Otherwise, where the purchases are made in good faith in the open market, with no notice of any fraud or irregularity in the issue. *Titus v. Great Western Turnpike*, 61 N. Y. 237; *Bruff v. Mali*, 36 N. Y. 200; *McNeil v. Tenth Na-*

tional Bank, 46 N. Y. 325; *Moore v. Metropolitan Bank*, 55 N. Y. 41; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Merchants' Bank v. Livingston*, 74 N. Y. 223; *Kentucky Bank v. Kurtz*, 99 Pa. St. 344, 349; *Tome v. Parkersburg R. R.*, 39 Md. 36; *Western Maryland R. R. v. Franklin Bank*, 60 Md. 36; *Bridgeport Bank v. New York & New Haven R. R.*, 30 Conn. 231; *New York & New Haven R. R. v. Schuyler*, 34 N. Y. 30. And see *Midland Ry. Co. v. Taylor*, 8 H. L. Cas. 751; *Bank v. Lanier*, 11 Wall. 369; *Telegraph Co. v. Davenport*, 97 U. S. 369; *Pratt v. Taunton Copper Co.*, 123 Mass. 110; *Pratt v. Boston & Albany R. R.*, 126 Mass. 443; *In re Bahia & San Francisco Ry.*, L. R. 3 Q. B. 584; *Ashby v. Blackwell*, 2 Eden, 399; *Hildyard v. South Sea Company*, 2 P. Wms. 76; *Simm v. Anglo-American Telegraph Co.*, 5 Q. B. Div. 188; *Hart v. Frontino Mining Co.*, L. R. 5 Ex. 111; *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; *Mackay v. Commercial Bank*, L. R. 5 P. C. 394; *Swift v. Winterbotham*, L. R. 8 Q. B. 244; *Swift v. Jewsbury*, L. R. 9 Q. B. 301; *The Queen v. Shropshire Union Co.*, L. R. 8 Q. B. 420; L. R. 7 H. L. 496.

authorized in the usual course of business to give information, may be given in evidence against the corporation.¹ It is because the declaration of an agent is a verbal act and part of the *res gestæ*, that it is admissible, and whenever what he did is admitted in evidence, then it is competent to prove what he said about the act while he was doing it.² It is within the scope of the general authority of the cashier of a bank to receive offers for the purchase of securities of the bank, and to state whether or not the bank owns securities which a customer wants to buy. His statement to such an one that the bank was not the owner of a certain security in his manual possession as cashier, is clearly within the line of his duty, and is, therefore, binding on the bank.³

Directors of a bank cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. That which they ought by proper diligence to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business. Hence, though it is quite true, that a cashier of a bank has no power by virtue of his office to bind the corporation, except in the discharge of his ordinary duties, and that the ordinary business of a bank does not comprehend a contract made by a cashier without delegation of power by the board of directors, involving the payment of money not loaned by the bank in a customary way;⁴ so that, ordinarily, he has no power to discharge a debtor without payment; nor to surrender the assets or securities of the bank; nor, — certainly not, unless the debt secured is paid, — cancel its deeds of trust given as security for money loaned, in the absence of authority conferred by the directors; it is clear that a banking corporation may be represented by its cashier, at least where its charter does not otherwise provide, in transactions outside of his ordinary duties, without his authority to do so being in writing,

¹ Bank of Monroe v. Field, 2 Hill, 445; McGinness v. Adriatic Mills, 116 Mass. 177; Morse v. Connecticut River R. R. Co., 6 Gray, 450.

² Mechanics' Bank of Alexandria v. Bank of Columbia, 5 Wheat. 326, 336; Cliquot's Champagne, 3 Wall. 114; Cooley v. Norton, 4 Cush. 93; Hannay v. Stewart, 6 Watts, 487; Garth v. Howard, 8 Bing. 451.

³ Xenia Bank v. Stewart, 114 U. S. 224. See Coheco Bank v. Haskell, 51

N. H. 116; Fleckner v. Bank, 8 Wheat. 338; Gould v. Cayuga Bank, 56 How. Pr. 505; Merchants' Bank v. Marine Bank, 3 Gill, 96; The Chicago, &c. R. R. Co. v. Coleman, 18 Ill. 297; Bank of Monroe v. Field, 2 Hill, 445; Mining Co. v. McMahon, 1 Head, 582.

⁴ United States Bank v. Dunn, 6 Pet. 51; United States v. City Bank of Columbus, 21 How. 356; Merchants' Bank v. State Bank, 10 Wall. 604.

or appearing upon the record of the proceedings of the directors. His authority may be by parol, and collected from circumstances. It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed without interference to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors. And when, during a series of years or in numerous business transactions, he has been permitted, without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations.¹

5. FRAUD AND CONCEALMENT BY AGENT.

An agent commissioned by a vendor to find a purchaser has authority to describe the property, and to state any fact or circumstance which may affect the value so as to bind the vendor; and if an agent so commissioned makes a false statement as to the description or value (though not instructed so to do) which the purchaser is led to believe, and upon which he relies, the vendor cannot recover in an action for specific performance. A surveyor was employed by the owner of a leasehold house to find a purchaser. He represented to the defendant that another person, H., was ready to buy the property for £700, and that if the defendant were to give £50 more, he would make a clear profit of seven per cent.; that H. had further offered to rent the property at £300, or the ground floor only at £200. The defendant, relying on the above representations and others, which were unauthorized by the vendor and untrue, contracted to purchase for £750; but, afterwards finding out the falsehood, refused to complete. The vendor himself also made a misleading statement to the purchaser. It was held that, independently of the statement made by the vendor himself, the false statements of the agent, being within his authority, were sufficient to vitiate the contract, and specific performance of the contract was refused.²

¹ *Martin v. Webb*, 110 U. S. 7. See authorities cited in note 3, p. 604, *ante*.

² *Mullens v. Miller*, 22 Ch. Div. 194. *Bacon, V. C.*, in delivering judgment, said: "A man employs an agent to let a house for him. That authority, in my opinion, contains also an authority to describe the property truly, to represent its actual situation, and, if he thinks fit, to represent its

value. That is within the scope of the agent's authority; and when the authority is changed, and instead of being an authority to let it becomes an authority to find a purchaser, I think the authority is just the same. I think the principal does thereby authorize his agent to describe, and binds him to describe truly, the property which is to be the subject disposed of.

A., being aware that B. wished to obtain shares in a certain company, represented to B. that he, A., could procure a certain number of shares at £3 a share. B. agreed to purchase at that price, and the shares were thereupon transferred, in part to him and in part to his nominees, and he paid to A. £3 a share. He afterwards discovered that A. was in fact the owner of the shares, having just bought them for £2 a share. It was held, on appeal, reversing the decision of Lord Romilly, M. R., that, on the facts, A. was an agent for B.; and A. was ordered to pay back to B. the difference between the prices of the shares.¹

The plaintiff, in the year 1868, consigned a ship to G. & Co., in China, for sale, fixing a minimum price of \$90,000, and requiring cash payment. G. & Co. employed the defendant in Japan to sell the ship, with the same instructions. This was done with the knowledge and consent of the plaintiff. The defendant, having vainly attempted to sell the ship on the terms mentioned, took her himself for \$90,000, and, about the same time, resold her to a Japanese prince for \$160,000, payable as to \$75,000 in cash, and the rest on credit. The plaintiff was not informed that the defendant had purchased the vessel himself, or that he had resold it, till June, 1869, after the transaction was completed. The defendant paid \$90,000 to G. & Co., who remitted it to the plaintiff, and eventually obtained the whole amount of \$160,000 from the Japanese prince. In 1873 the plaintiff filed a bill to compel the defendant to account for the profit made by him in the resale of the ship. Held, on appeal, affirming the decision of Hall, V. C., that the relation of principal and agent was established between the plaintiff and defendant, and existed at the time of the purchase and resale of the ship by the defendant, and that he was therefore liable to account to the plaintiff for the profit made by

He authorizes the agent to state any fact or circumstance which may relate to the value of the property. . . . A representation was made by an agent who, as I think, and as I hold, was authorized to make the representation if it was true, but who had no authority from his principal to state any falsehood. If he did state any falsehood on behalf of his principal, and if he thereby induced a purchaser to enter into a contract, he did that which now prevents the principal from saying that the agreement shall be specifically performed." See *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394; *Swire v. Francis*, 3 App. Cas. 106; *Higgins v. Samels*, 2 J. & H. 460; *Redgrave v. Hurd*, 20 Ch. Div. 1.

¹ *Kimber v. Barber*, L. R. 8 Ch. Ap.

56. The difficulty in the case with Lord Romilly was, that he treated the transaction as one between vendor and vendee; and as there could not be a *restitutio in integrum*, that the purchaser had lost his remedy. *Great Luxembourg Ry. Co. v. Magnay*, 25 Beav. 586. But the Court of Appeal held that a fiduciary relation existed between the parties, and that the case was one of a clearly established agency, in which the common relief would be decreed. *Hichens v. Congreve*, 4 Russ. 562, 577; *Bank of London v. Tyrrell*, 10 H. L. Cas. 26; *Fox v. Mackreth*, 2 Br. Ch. 400; *Fawcett v. Whitehouse*, 1 Russ. & M. 132; *Driscoll v. Bromley*, 1 Jur. 238, 306; *Lees v. Nuttall*, 1 Russ. & M. 53; *Massey v. Davies*, 2 Ves. 317; *Bentley v. Craven*, 18 Beav. 75; *Beck v. Kanterowicz*, 3 K. & J. 230.

him in the transaction. And that, on the principle that where a wrongful act has been completed without the knowledge or assent of the party injured, his right of action is not ordinarily barred by mere submission to the injury, or even by a voluntary promise not to seek redress,—some conduct amounting to release, or accord and satisfaction, must be shown; although on account of *laches* relief may be refused under special circumstances. It was further held, that there had been no such acquiescence or *laches* on the part of the plaintiff as to disentitle him to relief.¹

The knowledge of counsel in a particular transaction is notice to his client. And though the client may not actively participate in accomplishing a fraud, yet if he be looking on at what is done by another who is his confidential agent and professional adviser generally, and has been his agent and adviser in regard to a particular matter called in question as fraudulently accomplished, and if, when all is accomplished, the client take and profit by the fruits of all that has been done, he will be taken as affected with knowledge possessed by his agent.²

In *McPherson v. Watt*,³ where an agent bought property from his principals, of whom he was the attorney, pretending that it was for another, and concealing from his principals the fact that he was buying it for himself, the House of Lords held, reversing the decision of the Scotch court⁴ appealed from, that the purchase could not be enforced. And *per* Lord Cairns, V. C., assuming that, in every respect, this was a sale which might have been supported had the principals been told that their agent was himself the purchaser, it could not be supported, that fact not having been disclosed.⁵

¹ *De Bussche v. Alt*, 8 Ch. D. 286. See *Fawcett v. Whitehouse*, 1 Russ. & My. 132; *Hay's Case*, L. R. 10 Ch. 593; *Dunne v. English*, L. R. 18 Eq. 524; *Duke of Leeds v. Earl Anherst*, 2 Ph. 123.

² *May v. Le Claire*, 11 Wall. 217; reporter's note.

³ 3 App. Cas. 254.

⁴ Scotch Cases, 4th series, vol. iv. p. 601.

⁵ Lord Blackburn somewhat quaintly observed: "He was advising them, and, therefore, he was quite in a different position from a man who was a stranger bargaining for himself. Such a man might say, Your house is not a good one. He might say it was valueless, and you had better sell it a great deal cheaper, and take a smaller price for it. Such has been the course of business for at least three thousand years. *'It is naught, it is*

naught, saith the buyer: but when he is gone his way, then he boasteth.' Proverbs xx. 14. When a vendor is dealing with a stranger, the purchaser is not to tell him any lies; but the vendor has no right to say, I expect and believe that he will give him disinterested advice. On the other hand, when an attorney is acting for both sides it is otherwise. Then the vendor has a right to expect that there shall be disinterested and true advice, and I do not see the practical difficulty of giving it." *Murphy v. O'Shea*, 2 J. & La T. 422; *Lewis v. Hillman*, 3 H. L. Cas. 607; *Charter v. Trevelyan*, 11 Cl. & F. 714; *Tate v. Williamson*, L. R. 1 Eq. 528; L. R. 2 Ch. App. 55; *Gibson v. Jeyes*, 6 Ves. 278; *Smith v. Kay*, 7 H. L. Cas. 750; *Billage v. Southee*, 9 Hare, 534, 540; *Holman v. Loynes*, 4 De G. M. & G. 278. In *Lewis v. Hillman*, 3 H. L.

The plaintiff authorized defendant, as his broker, to negotiate for the purchase of a particular ship on the basis of an offer of £9000; but eventually the ship was purchased through defendant for £9250. Prior to the sale, an arrangement had been made between the vendor and a broker, S., that if S. could sell the ship for more than £8500 he might retain for himself the excess; and it was arranged between S. and defendant, without the knowledge or sanction of plaintiff, that defendant should receive from S. a portion of such excess; and accordingly defendant received £225, part of the excess over £8500. On discovering this, the plaintiff brought an action for money had and received for the £225.¹ In addition to the above facts, the jury found that defendant was the agent of plaintiff to purchase the ship as cheaply as she could be got, and plaintiff could have got her cheaper but for the arrangement between vendor and S. On verdict entered for the plaintiff the action was sustained.²

In *Barwick v. English Joint Stock Bank*,³ it was held, by the Exchequer Chamber, that a principal is liable to an action for the fraudulent misrepresentation of his agent, acting in the course of his business.⁴ The facts were that the plaintiff, hav-

Cas. 607, 630, Lord St. Leonards, in holding in the case of a sale of any kind which is so fair, so reasonable as to price, so entirely free from anything else that is obnoxious, as to be capable of being supported, yet if there has entered into the sale the ingredient that the client has not been made aware that the real purchaser is his law agent, if the purchase has been made in the name of some other person for that law agent, that is a sale which cannot be supported, said: "No man in a court of equity is allowed himself to buy and sell the same property. He cannot sell to himself. Even in the case of a fair trustee, he cannot sell to himself. If he has the power or the trust to sell, he must have some one to deal with. Courts of equity do not allow a man to assume the double character of seller and purchaser; and it is necessary, in order to preserve the interests of persons entitled beneficially to property, to maintain that rule. I should lay it down as a rule that ought never to be departed from, that if an attorney or agent can show he is entitled to purchase, yet if, instead of openly purchasing, he purchases in the name of a trustee or agent without disclosing the fact, no such purchase as that can stand for a single moment. Such a transaction to stand must be open and fair, and free from all objection. And if a man purchase by putting forward a clerk of his

own, not as a clerk, not as an agent, but as an actual *bonâ fide* purchaser upon an absolute and independent contract, he does that which, the moment it is stated, renders the deed powerless for the purpose for which it was framed and executed; and the court will hold the parties responsible for everything that results from it."

¹ In *Rogers v. Boehm*, 2 Esp. 702, Lord Kenyon ruled that interest made by an agent by the use of his principal's money belonged to the latter, and might be recovered by him in an action for money had and received. *Thompson v. Havelock*, 1 Camp. 527; *Diplock v. Blackburn*, 3 Camp. 43; *Barber v. Dennis*, 6 Mod. 69; *Anon.* 12 Mod. 415. And in equity the rule is that the profits, directly or indirectly made in the course of or in connection with his employment by a servant or agent, without the sanction of the master or principal, belong absolutely to the master or principal. *Massey v. Davies*, 2 Ves. 317; *Turnbull v. Garden*, 38 L. J. Ch. 331, 334; *Kimber v. Barber*, L. R. 8 Ch. Ap. 56.

² *Morison v. Thompson*, L. R. 9 Q. B. 480.

³ L. R. 2 Ex. 259.

⁴ This point was decided as long ago as the time of Salkeld (A. D. 1708), in *Hern v. Nichols*, 1 Salk. 289, where, in an action for a deceit, the plaintiff set forth,

ing for some time, on a guarantee of the defendants, supplied J. D., a customer of theirs, with oats on credit, for carrying

that he bought several parcels of silk for — silk, whereas it was another kind of silk; and that the defendant, well knowing this deceit, sold it to him for — silk. On trial, upon a plea of not guilty, it appeared that there was no actual deceit in the defendant who was the merchant, but that it was in his factor beyond sea. And the doubt was, if this deceit could charge the merchant. Holt, C. J., held, that the merchant was answerable for the deceit of his factor, though not *criminuliter*, yet *civiliter*; “for seeing somebody must be a loser by this deceit, it is more reason that he who employs and puts a trust and confidence in the deceiver should be a loser than a stranger.” And, upon this opinion, the plaintiff had a verdict. The same principle was applied in *Fitzherbert v. Mather*, 1 T. R. 12, where, in a case of insurance, the policy was obtained by the fraudulent concealment of the agent of the loss of the vessel, the principal having no knowledge of the fact. Ashurst, J., said: “On general principles of policy, the act of the agent ought to bind the principal; because it must be taken for granted, that the principal knows whatever the agent knows. And there is no hardship on the part of the plaintiff; for if the fact had been known, the policy could not have been effected.” Lord Hardwicke, in *Hartop v. Hoare*, 3 Atk. 44, 47, by a distinction which he there draws, well shows that to make the principal liable for the fraud of his agent, the fraud must have been committed within the scope of the agent’s employment, — a principle which is the very basis of the well-decided modern cases on the subject. Lord Hardwicke, referring to the holding of Holt, C. J., in *Hern v. Nichols*, 1 Salk. 289, says: “There is no doubt but the verdict was right in that case, for the defendant employed his factor in the act of selling, in which the deceit was committed, and by employing him as a factor he created a credit in him.” But, in *Hartop v. Hoare*, 3 Atk. 44, the plaintiff lodged jewels for safe custody with S., carefully sealed, and S. subsequently took out the jewels, and obtained money on them from a banker. Here, Lord Hardwicke says, *Hern v. Nichols* is not the present case, “for the plaintiff here gave no power to S. to do the act in which the deceit was, but on the contrary hath used a prudent method to prevent it. The present case, therefore, is like the case in 1 Inst. 89, where A. leaves a chest locked with B., and taketh away the key; there A. does not entrust

B. with the goods.” Fraud will vitiate any transaction, though the principal do not personally take any part in the fraud, if his agent do; for the principal is civilly responsible for the acts of his agent within the scope of his employment. *Doe v. Martin*, 4 T. R. 39. So, in *Udell v. Atherton*, 7 H. & N. 172, it was held by Pollock, C. B. and Wilde, B., Martin and Bramwell, BB., dissenting, that a principal is liable, in an action of deceit, for the false and fraudulent representations of his agent, as to the quality and value of an article, whereby a person has been induced to purchase it for more than its worth, notwithstanding that the principal neither authorized nor knew of the fraudulent conduct of his agent. The plaintiff having paid for the article, in an action against the principal for the fraud the plaintiff was nonsuited; so the opinion of Martin and Bramwell, BB., prevailed. The rule was admitted all around in this case to be that wherever an agent, within the scope of his authority, makes a fraudulent misrepresentation, his principal is liable. But the difficulty which arose in the case was in applying the rule, and the prevailing opinion really rested upon the fact that the agent was really a special and not a general agent, and that the fraud was that of the agent and not of the principal. This is considered by the court in *Barwick v. English Joint-Stock Bank*, L. R. 2 Ex. 259, 265, where it is said: “If there be fraud in the manager, then arises the question, whether it was such a fraud as the bank, his employers, would be answerable for. With respect to that, we conceive we are in no respect overruling the opinions of my Brothers Martin and Bramwell, in *Udell v. Atherton*, 7 H. & N. 172, the case most relied upon for the purpose of establishing the proposition that the principal is not answerable for the fraud of his agent. Upon looking at that case, it seems pretty clear that the division of opinion which took place in the Court of Exchequer arose, not so much upon the question whether the principal is answerable for the act of an agent in the course of his business, — a question which was settled as early as Lord Holt’s time, — but in applying that principle to the peculiar facts of the case: the act which was relied upon there as constituting a liability in the sellers having been an act adopted by them under peculiar circumstances, and the author of that act not being their general agent in business, as the manager of a bank is.” See further, *Cornfoot v. Fowke*, 6 M. & W. 373; *Wilson v. Fuller*,

out a government contract, refused to continue to do so unless he had a better guarantee. The defendants' manager thereupon gave him a written guarantee to the effect that the customer's check on the bank in plaintiff's favor, in payment for the oats supplied, should be paid, on receipt of the government money, in priority to any other payment, "except to this bank." J. D. was then indebted to the bank to the amount of £12,000, but this fact was not known to the plaintiff, nor was it communicated to him by the manager. The plaintiff thereupon supplied the oats to the value of £1227, the government money, amounting to £2676, was received by J. D., and paid into the bank; but J. D.'s check for the price of oats, drawn on the bank in favor of the plaintiff, was dishonored by the defendants, who claimed to retain the whole sum of £2676, in payment of J. D.'s debt to them. The plaintiff having brought an action for false representation, and for money had and received, on the trial of the cause before Martin, B., a nonsuit was directed on the ground that there was no evidence to go to the jury in support of the plaintiff's case. But, on exceptions, the court held, that, on the facts, the jury might justly come to the conclusion that the manager knew and intended that the guarantee should be unavailing; that he procured for his employers, the bank, the government check, by keeping back from the plaintiff the state of J. D.'s account, and that he intended to do so; from which the jury would conclude that there was such a fraud in the manager as the plaintiff complained of, *second*, that this was such a fraud in the manager as the bank, his employers, would be answerable for; and, *third*, that the description of such fraud as the fraud of the bank was proper.¹ A *venire de novo* was accordingly ordered.

3 Q. B. 68; *Murray v. Maun*, 2 Ex. 538; *Wilde v. Gibson*, 1 H. L. Cas. 605; *Brady v. Todd*, 9 C. B. N. s. 592; *Fenn v. Harrison*, 3 T. R. 760; *Croft v. Alison*, 4 B. & Ad. 590; *Ewbank v. Nutting*, 7 C. B. 797; *Hamilton v. Watson*, 12 Cl. & F. 109; *Lee v. Jones*, 17 C. B. N. s. 503; *Goff v. Great Northern Ry. Co.*, 3 E. & E. 672; *Roe v. Birkenhead Ry. Co.*, 7 Ex. 36; *Barry v. Midland Ry. Co., Ir. L. Rep.* 1 C. L. 130; *Huzzey v. Field*, 2 C. M. & R. 432, 440; *Pickering v. Dowson*, 4 Taunt. 779; *Haycraft v. Creasy*, 2 East, 92; *Polhill v. Walter*, 3 B. & Ad. 114; *Levy v. Langridge*, 4 M. & W. 337; *Moen v. Hayworth*, 10 M. & W. 147; *Evans v. Collins*, 5 Q. B. 804, 820; *Pasley v. Freeman*, 3 T. R. 51.

¹ This was so held in *Raphael v. Goodman*, 8 A. & E. 565, where to an action

by a sheriff against an execution creditor, on a bond of indemnity for seizing goods under a *f. fa.*, defendant pleaded that the bond was obtained from defendant, by plaintiff and others in collusion with him, by fraud and misrepresentation. It was held that the defendant supported this plea by proof that the sheriff's officer, who executed the process, obtained the bond by fraud and misrepresentation, although the plaintiff did not appear to have been personally cognizant of any part of the transaction. See, also, to the same effect, *Woodgate v. Knatchbull*, 2 T. R. 148; *Sturmy v. Smith*, 11 East, 25; *Fitzherbert v. Mather*, 1 T. R. 42; *Doe v. Martin*, 4 T. R. 39; *Laicoek's Case*, Noy, 90; *Sanderson v. Baker*, 2 W. Bl. 332; *Smart v. Hutton*, 2 N. & M. 426; *North v. Miles*, 1 Camp. 389.

A company formed to work a mine was compelled from want of funds to cease working; money was then advanced to them by some of the directors, and among them Barnett and Baldwin. Afterwards at a general meeting of the company, held in order, among other things, to provide for the existing deficit and for working expenses, the directors were authorized to issue debentures on such terms and for such amounts as they in their discretion might think fit. The directors accordingly authorized the secretary to employ a firm of brokers to place the debentures. The brokers prepared and issued a prospectus, bearing the names of Bell and others as directors, and containing statements as to the condition and prospects of the company, on the faith of which the plaintiff and others purchased debentures. The money thus raised was paid to the company's bankers, and part of it was applied by the directors on behalf of the company to repay the advances made by Barrett and Baldwin. The debentures having become worthless, the plaintiff brought an action for damages against Bell and others in respect of the statements in the prospectus, some of which were alleged to be fraudulent. The jury found that the prospectus contained statements of fact which were false to the knowledge of the brokers, and by which the plaintiff was induced to part with his money: that none of the false statements were made by Bell personally or by his authority; that the brokers had authority to issue a prospectus, but no authority to include in it statements which were fraudulent; and that Bell derived no benefit from the money raised by the debentures. Held, by Cockburn, C. J., Bramwell, and Brett, L. JJ., (Cotton, L. J., dissenting), affirming the judgment of the Exchequer Division, that the defendant Bell was not liable. By Cockburn, C. J., and Brett, L. J., on the ground that though a party as director, to the receipt of money, the defendant, Bell, was not aware of the falsehood of the statements contained in the prospectus, and derived no personal benefit from the receipt of the money. By Bramwell, L. J., that the defendant, Bell, had been guilty of no moral fraud, and not being the principal of the brokers, could not be held to have impliedly undertaken for the absence of fraud in them in issuing the prospectus. Cotton, L. J., held, in dissenting from the other judges, that the defendant, Bell, was liable in an action to the plaintiff, for it was his duty as director to ascertain whether the statements in the prospectus were true or false.¹

¹ *Weir v. Barnett*, 3 Ex. Div. 238. The judges in the Exchequer Division (Kelly, C. B., Pollock and Huddleston, BB.), whose decision was sustained in respect to Bell by the Court of Appeal, held unanimously that the brokers were

The plaintiffs instructed a broker to re-insure an overdue ship. Whilst acting for the plaintiffs, the broker received information

really not the agents of the directors, but of the company, the directors being intervening agents; that the repayment of the moneys to Barnett and Baldwin, though in some sense consequent upon, had no necessary connection with, the fraudulent statements in the prospectus; that Barnett and Baldwin were not the principals of the brokers, so as to bring the former within the rule that a principal is answerable where he has received a benefit from the fraud of an agent within the scope of his authority, and, therefore, that the plaintiffs could not recover in their action against any of the defendants, among whom were Barnett and Baldwin. *Ibid.* 3 Ex. Div. 32. The appeal to the Court of Appeal, was only in respect to the defendant Bell. The judges of the Court of Appeal, as to the question of the liability of the company, were of opinion with the court below that the company would have been liable for the fraud. And had the appeal been as to the judgment in favor of Barnett and Baldwin, Cockburn, C. J., and Brett, L. J., with Cotton, L. J., would have reversed the judgment of the Exchequer Division with respect to them. Cockburn, C. J., in delivering the judgment of himself and Brett, L. J., on these two points, said: "The Court of Exchequer Division gave judgment in favor of the defendants, on the ground that the brokers, in issuing the prospectus, had acted as the agents not of the defendants, but of the company; that the directors had been merely the officers and agents of the company in carrying into effect the resolution of the company that debentures should be issued; and in doing what was necessary for that purpose, *inter alia* in directing that a prospectus should be prepared and published, had been in no sense principals; consequently that the rule, that a principal who derives benefit from a fraud committed by his agent in the course of his employment becomes liable to a party injured by the fraud, has here no application, though upon the authority of *Barwick v. English Joint Stock Bank* (L. R. 2 Ex. 259) the fraud in question would have made the company liable had the action been brought against them. I concur in the view that the defendants, in what they did, were acting as the agents of the company, and not as principals, and therefore that they would not be liable, generally speaking, for misrepresentations made without their authority by persons employed by them on behalf of the company, and who in such employment were acting, not as their agents, but as the

agents of the company. But the court below appear to have overlooked a circumstance which, as it seems to me, makes all the difference; namely, that, with the exception of the defendant Bell, all the defendants, though not parties to the issuing of the prospectus as fraudulently framed, yet, knowing that it had been issued, and with the knowledge of its fraudulent character which their perfect acquaintance with the affairs of the company must have given them, not only allowed the plaintiff and others to advance their money on the faith of the false representations contained in it, and by receiving the money became parties to the fraud, but, on their own authority, applied a considerable portion of the money so received to the discharge of their own pecuniary claims on the company, — claims which the company had no other means whatever of satisfying. Even the defendant Barnett, who left England in August, 1873, and did not return till 1874, and who was ignorant of all that was done in the interval, inclusive even of the fact of the payment of the amount due to him from the company, the money having been paid to his agents in his absence, having retained the money when the facts came to his knowledge, stands on the same footing with the rest. Now, I take it to be undoubted law that, if an agent, in the course of his employment, commits a fraud upon another party, whereby damage ensues to the latter, he will be liable to the party wronged, though his principal would be so likewise. The case of *Henderson v. Lacon* (L. R. 5 Eq. 249) proceeded on this principle. And in *Challen v. Thompson's Trustees* (4 Macq. 424), Lord Westbury says: "All persons concerned in the commission of a fraud are to be treated as principals. No party can be permitted to excuse himself on the ground that he acted as the agent or servant of another." *A fortiori*, this would be so where the agent himself derives benefit from the fraud. The present case differs, it is true, in this, that here the defendants, being the agents of the company, employed sub-agents to publish the prospectus, but were no parties to the fraudulent statements contained in it, such statements having been published by the sub-agents without their authority or knowledge. But having, with the exception of the defendant Bell, become aware of those statements, and being also aware of their falsehood, they were parties to the issuing of the debentures, and applied a considerable portion of the

material to the risk, but did not communicate it to them, and the plaintiffs effected a re-insurance for £800, through the broker's London agents. Afterwards the plaintiffs effected a re-insurance for £700, lost or not lost, through another broker. The ship had in fact been lost some days before the plaintiffs tried to re-insure, but neither the plaintiffs nor the last-named broker knew it, and both he and the plaintiffs acted throughout in good faith. The House of Lords held,¹ reversing the judgment of the Court of Appeal, and restoring the judgment of Day, J., that the knowledge of the first broker was not the knowledge of the plaintiffs, and that the plaintiffs were entitled to recover upon the policy for £700.²

proceeds to the satisfaction of their own claims on the company. Now, I apprehend that where an agent employs a sub-agent, and the latter, in the course of his employment, is guilty of fraud or misrepresentation, and the agent, with knowledge of the fraud, derives a material benefit from it, the case becomes analogous to that of a principal who profits by the fraud of his agent, the principle being that he who profits by the fraud of one who is acting by his authority, though committed without his authority, adopts the act of the agent, and becomes responsible to the party who has been imposed upon, and has sustained damage by reason of it. If, therefore, the case of the defendant Bell, with which alone we have to deal, as it is only against the decision of the court below in his favor that the present appeal has been brought, had been undistinguishable from that of the other defendants, I should not have felt warranted in affirming the decision. But his case differs from that of the other defendants in two most important particulars. *First*, that though party to the receipt of the plaintiffs' money, he does not appear to have been at that time acquainted with the real state of the company's affairs, and thus aware of the falsehood of the statements contained in the prospectus; *secondly*, that none of the money actually came into his pocket." *Weir v. Bell*, 3 Ex. Div. at p. 247 *et seq.* See *Swift v. Winterbotham*, L. R. 8 Q. B. 244; *Swift v. Jewsbury*, L. R. 9 Q. B. 312; *Western Bank of Scotland v. Addie*, L. R. 1 Sc. & D. 145; *MacKay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 412; *Reese River Silver Mining Co. v. Smith*, L. R. 4 H. L. 79; *Bayley v. Manchester, &c. Ry. Co.*, L. R. 7 C. P. 415; *Directors, &c. of Central Ry. Co. v. Kisch*, L. R. 2 H. L. 113; *Henderson v. Lacon*, L. R. 5 Eq. 249, 261; *Land Credit Co. of Ireland v. Fermoy*, L. R. 5 Ch. 763; *Sands v. Child*, 3 Lev. 351; *Bennett*

v. Bayes, 5 H. & N. 391; *Cullen v. Thompson*, 4 Macq. 424; *Mersey Docks Co. v. Gibbs*, L. R. 1 H. L. 127; *Wilde v. Gibson*, 1 H. L. Cas. 615; *New Brunswick & Canada Ry. Co. v. Connybeare*, 9 H. L. Cas. 711; *National Exchange Co. v. Drew*, 2 Macq. 124; *Davidson v. Tulloch*, 3 Macq. 783; *Brady v. Tod*, 9 C. B. N. s. 592; *Peek v. Gurney*, L. R. 6 H. L. 392; *Ewbank v. Nutting*, 7 C. B. 797.

¹ *Blackburn v. Vigors*, 12 App. Cas. 531.

² The following principles, as far as they relate to the duty of the agent to communicate all the facts of which he possesses knowledge to the same extent as the principal would be bound to communicate knowledge which he himself possesses, to the other contracting party, is as applicable to the contract of sale as to the contract of insurance. "I can quite understand," said Lord Halsbury, L. C. (*Blackburn v. Vigors*, 12 App. Cas. 536), "that when a man comes for an insurance upon his ship he may be expected to know both the then condition and the history of the ship he seeks to insure. If he takes means not to know, so as to be able to make contracts of insurance without the responsibility of knowledge, this is fraud. But even without fraud, such as I think this would be, the owner of the ship cannot escape the necessity of being acquainted with his ship and its history, because he has committed to others—his captain, or his general agent for the management of his shipping business—the knowledge which the underwriter has a right to assume the owner possesses when he comes to insure his ship. With respect to agency so limited, I am not disposed to differ with the proposition laid down by Cockburn, C. J., in *Proudfoot v. Montefiore*, L. R. 2 Q. B. 511, 521. A part of the proposition is 'that the insurer is entitled to assume as the basis of the contract between him and the assured that the latter will communicate to him every material fact of which the assured has, or

In June, 1857, the defendants, in Indiana, being desirous of obtaining money, made their acceptances of two blank bills of ex-

in the ordinary course of business ought to have knowledge.' I think these last are the cardinal words, and contemplate such an agency as I have described above. I am unable, however, to see that the present case is governed by any such principle. A broker is employed to effect a particular insurance. While so employed he receives material information. He does not effect the insurance, and he does not communicate the information. How is it possible to suggest that the assured could rely upon the communication to the principal of every piece of information acquired by any agent through whom the assured has unsuccessfully endeavored to procure an insurance? I am unable to accept the criticism by the Master of the Rolls [in the Court of Appeal], upon the proposition that the knowledge of the agent is the knowledge of the principal. When the person is the agent to know, his knowledge does bind the principal. But in this case I think the agency of the broker had ceased before the policy sued upon was effected. The principal himself and the broker through whom the policy sued on was effected were both admitted to be unacquainted with any material fact which was not disclosed. I cannot but think that the somewhat vague use of the word 'agent' leads to confusion. *Some agents so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts, intentions, and knowledge of the principal. Other agents may have so limited and narrow an authority both in fact and in common understanding of their form of employment, that it would be quite inaccurate to say that such an agent's knowledge or intentions are the knowledge or intentions of his principal; and whether his acts are the acts of his principal depends upon the specific authority he has received.* In *Fitzherbert v. Mather*, 1 T. R. 12, the consignor and shipper of the goods insured was the agent whose knowledge was in question. In *Gladstone v. King*, 1 M. & S. 35, the master of the ship was the agent; and in *Proudfoot v. Montefiore*, L. R. 2 Q. B. 511, the agent was the accepted representative of the principal, in effect, trading and acting for him in Smyrna, the owner himself carrying on business in Manchester. And though the decision in *Ruggles v. General Insurance Co.*, 12 Wheat. 408, before the Supreme Court of the United States, may not be very satisfactory in what they held under the circumstances of that case to be the relation between the captain of the ship

and his owners, the principle upon which that case was decided was the supposed termination of the agency between them. Where the employment of the agent is such that in respect of the particular matter in question he really does represent the principal, the formula that the knowledge of the agent is his knowledge is, I think, correct; but it is obvious that that formula can only be applied when the words 'agent' and 'principal' are limited in their application. *To lay down as an abstract proposition of law, that every agent, no matter how limited the scope of his agency, would bind every principal even by his acts, is obviously, and upon the face of it, absurd; and yet it is by the fallacious use of the word 'agent' that plausibility is given to reasoning which requires the assumption of some such proposition.* What then is the position of the broker in this case, whose knowledge, though not communicated, is held to be that of the principal? He, certainly, is not employed to acquire such knowledge, nor can any insurer suppose that he has knowledge in the ordinary course of employment like the captain of a ship, or the owner himself, as to the condition or history of the ship. In this particular case the knowledge was acquired, not because he was the agent of the assured, but from the accident that he was general agent for another person. The reason why, if he had effected the insurance, his knowledge, unless he communicated it, would have been fatal to the policy, is because his agency was to effect an insurance, and the authority to make the contract drew with it all the necessary powers and responsibilities which are involved in such an employment; but he had no general agency; he had no other authority than the authority to make the particular contract, and his authority ended before the contract sued on was made. When it was made, no relation between him and the shipowner existed which made or continued him an agent for whose knowledge his former principal was responsible. There was no material fact known to any agent which was not disclosed at the point of time at which the contract was made; there was no one possessed of knowledge whose duty it was to communicate such knowledge."

We entirely concur in the reasoning in the foregoing, which thoroughly agrees with the views we express, *infra* (see Vol. II., Book III., Part I.), in our discussion of the cases relating to the power of a shipmaster, as agent, to bind the shipowner, as principal, by the fraudulent signing of

change, in sets of two parts each, and sent them to their agent, R., in Pittsburgh, Pennsylvania. The two sets were left blank except that they were made in favor of R., and were accepted on their face by the defendants, who instructed R. to fill up the blanks; to procure the signatures of the requisite parties as accommodation drawers and indorsers; to sell and negotiate the bills, as perfected, for money, and to remit the proceeds to the defendants. In July following, at the request of R., the defendants sent him four other similar blank acceptances, to be sold and negotiated by him in double sets, the proceeds of these to be retained by R. for his own use. R. got the whole of the firsts of exchange and two of the seconds of exchange discounted, and kept the proceeds. The seconds were in every respect completed bills of exchange, and they were discounted by the plaintiffs, without any notice of the facts or circumstances of the way in which R. held them, unless the words "second of exchange, first unpaid," could be held to have that import. The court held, in an action by the plaintiffs on these two bills,¹ that the defendants were liable on the following grounds:—

First. Because, where a party to a negotiable instrument intrusts it to the custody of another not filled up, whether it be for the purpose to accommodate the person to whom it was intrusted, or to be used for his own benefit, such negotiable instrument carries on its face an implied authority to fill up the blanks and perfect the instrument; and as between such a party and innocent third parties, the person to whom it was so intrusted must be deemed the agent of the party who committed such instrument to his custody; or, in other words, it is the act of the principal, and he is bound by it.²

a bill of lading, where the goods have not been received. The sentences which we have above italicised are so peculiarly applicable to our lengthy discussion of that subject, that we re-quote them: "Some agents so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts, intentions, and knowledge of the principal. Other agents may have so limited and narrow an authority both in fact and in common understanding of their form of employment, that it would be quite inaccurate to say that such an agent's knowledge or intentions are the knowledge or intentions of his principal; and whether his acts are the acts of his principal depends upon the specific authority he has received. . . . To lay down as an abstract proposition of law that every agent, no matter how limited the scope of his agency, would bind every

principal, even by his acts, is obviously, and upon the face of it, absurd." *Blackburn v. Vigers*, 12 App. Cas. pp. 537, 538, *per* Lord Chancellor Halsbury. See the case in the court below, *Blackburn v. Vigers*, 17 Q. B. Div. 553, Lord Esher, M. R., dissenting from the reversed judgment of Lindley and Lopes, L. JJ. And see *Williams v. North China Ins. Co.*, 1 C. P. Div. 757; *Fitzherbert v. Mather*, 1 T. R. 12; *Gladstone v. King*, 1 M. & S. 35; *Ruggles v. General Interest Ins. Co.*, 4 Mason, 74; 12 Wheat. 408; *Stewart v. Dunlop*, 4 Bro. P. C. 483; *Proudfoot v. Montefiore*, L. R. 2 Q. B. 511; *Stribley v. Imperial Marine Ins. Co.*, 1 Q. B. Div. 507; *Wyllie v. Pollar*, 32 L. J. Ch. 782; *Lynch v. Dunsford*, 14 East, 494.

¹ *The Bank of Pittsburgh v. Neal*, 22 How. 96.

² *Goodman v. Simonds*, 20 How. 361; *Violet v. Patton*, 5 Cranch, 142.

Secondly. Because a *bonâ fide* holder of a negotiable instrument, for a valuable consideration, without notice of the facts which impeach its validity between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon although, as between the antecedent parties, the transaction may be without any legal validity.¹

Thirdly. The question as to the effect of the words, "second of exchange, first unpaid," is one of law for the court, and not of fact for the jury;² and

Fourthly. As either of the set of bills of exchange may be presented for acceptance, and if not accepted a right of action presently arises, upon due notice, against all the antecedent parties to the bill, without any other of the set being presented; the fact of the words, "second of exchange, first unpaid," having been on the two parts negotiated, was no notice to the *bonâ fide* purchasers that the firsts had also been accepted; which double acceptance is improper;³ and, if merely the result of enabling a third person to do a wrong, comes within the rule applicable to cases of agency, that where one of two innocent parties must suffer through the fault or negligence of a third party, the loss must fall on him who gave the credit.⁴

¹ *Swift v. Tyson*. 16 Peters, 15; *Goodman v. Simonds*, 20 How. 363.

² *Andrews v. Pond*, 13 Peters, 5; *Fowler v. Brantly*, 14 Pet. 318; *Goodman v. Simonds*, 20 How. 366.

³ *Chitty on Bills* (10 Am. ed.), 155; *Byles on Bills*, 310; *Hobbsworth v. Hunter*, 10 B. & C. 449; *Davidson v. Robertson*, 3 Dow P. C. 225.

⁴ *Fitzherbert v. Mathew*, 1 T. R. 16, *per* Buller, J.; *Androsoggin Bank v. Kimball*, 10 Cush. 373; *Montague v. Perkins*, 17 Jur. 557.

Speight v. Gaunt, 22 Ch. Div. 727, affirmed by the House of Lords, *Ibid.* 9 Ap. Cas. 1, holds that a trustee investing trust funds is justified in employing a broker to procure securities authorized by the trust and in paying the purchase-money to the broker, if he follows the usual and regular course of business adopted by ordinary prudent men in making such investment. In this case the broker, who was employed by a trustee to buy securities of municipal corporations authorized by the trust, gave the trustee a bought note which purported to be subject to the rules of the London Stock Exchange, and obtained the purchase-money from the trustee upon the representation that it was payable the next day, which was the next account day on the London

Exchange. The broker never procured the securities, but appropriated the money to his own use and finally became insolvent. Some of the securities were procurable only from the corporations direct, and were not bought and sold in the market, and there was evidence that the form of the bought note would have suggested to some experts that the loans were to be direct to the corporations; but, as the House of Lords held on the facts, there was nothing calculated to excite suspicion in the mind of the trustee or of an ordinary prudent man of business; and such payment to a broker was in accordance with the usual course of business in purchases on the London Exchange. It was therefore held by the House of Lords (Lord Fitzgerald doubting) that the trustee was not liable to the *cestuis que trust* for the loss of the trust funds. Lord Fitzgerald, in expressing the doubts which he entertained on the facts in the case, accepted it as settled law that although a trustee cannot delegate to others the confidence reposed in himself, nevertheless he may in the administration of the trust fund avail himself of the agency of third parties, such as bankers, brokers, and others, if he does so from a moral necessity or in the regular course of business. If a loss to the trust fund should be occasioned thereby, the

S., being employed by the respondent to carry on his business, credited the respondent in account with the appellant with the sum of 5800 taels, which he falsely represented to have been advanced in the ordinary course of business on certain goods intended for shipment. He then drew a bill in the name of the respondent's firm on the appellants for the balance of account, and having received the proceeds of such bill, including the said 5800 taels, appropriated them to his own use. On a special case submitting whether the respondent was liable to the appellants in the said sum, with interest from date of receipt by S., it was held by the Privy Council, that the proceeds of the bill having been received as aforesaid by S., acting throughout within the scope of his authority, belonged to the respondent; and that he having thus been paid 5800 taels without consideration, the appellants were entitled to recover back the same.¹

In an action to recover damages for a fraudulent misrepresentation, L. ordered the defendant to buy rupee paper for him. The defendant sold rupee paper of his own to L., whilst he fraudulently

trustee will be exonerated unless some negligence or default of his has led to that result. *Ibid.* at p. 29.

A trustee or executor who conducts the business of the trust in the same manner that an ordinary prudent man of business would conduct his own, does all that is required of him, and beyond that there is no liability or obligation on the trustee. *In re Bird*, L. R. 16 Eq. 203; *Job v. Job*, 6 Ch. Div. 562; *Jones v. Lewis*, 2 Ves. Sen. 240; *Ex parte Belchier*, Amb. 218; *Bacon v. Bacon*, 5 Ves. 331; *Joy v. Campbell*, 1 Sch. & Lef. 328, 341; *Clough v. Burd*, 3 M. & Cr. 490, 497; *Castle v. Wailand*, 32 Beav. 660. But where the trustee has not taken proper precautions which he might have taken against being deceived, then the rule has been applied that, as between two innocent parties, one of whom must suffer from the wrongful acts of the broker, the loss must fall on the trustee who employed the dishonest broker. *Bostock v. Floyer*, L. R. 1 Eq. 26; *Sutton v. Wilders*, L. R. 12 Eq. 373; *Hopgood v. Parkin*, L. R. 11 Eq. 74. And see *Matthews v. Brise*, 6 Beav. 239; *Mendes v. Guedalla*, 2 J. & H. 259; *Langford v. Gascoyne*, 11 Ves. 333; *Lord Shipbrook v. Lord Hinchbrook*, 11 Ves. 252; 16 Ves. 477; *Underwood v. Stevens*, 1 Mer. 712; *Hanbury v. Kirkland*, 3 Sim. 265. The law is well laid down by Lord Cottenham, in *Clough v. Burd*, 3 M. & Cr. 496. "It will be found to be the result of all the best authorities upon the subject, that, although a personal representative, acting strictly within the

line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorized, or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive." *Walker v. Synonds*, 3 Swanst. 1; *Wilkins v. Hagg*, 8 Jur. N. s. 25; *Chambers v. Minchin*, 7 Ves. 196; *Gregory v. Gregory*, 2 Y. & C. Ex. 313; *Booth v. Booth*, 1 Beav. 125; *Egbert v. Butter*, 21 Beav. 560; *Thompson v. Finch*, 22 Beav. 316; *Cowell v. Gatecombe*, 27 Beav. 568; *Brice v. Stokes*, 11 Ves. 219; *Oliver v. Covert*, 8 Price, 166; *In re Chertsey Market*, 6 Price, 279; *Attorney-General v. Holland*, 2 Y. & C. Ch. 699; *Williams v. Nixon*, 2 Beav. 472; *Blackwood v. Borrowes*, 2 Con. & L. 477.

¹ *Swire v. Francis*, 3 App. Cas. 106. This case approved and followed *Barwick v. The English Joint-Stock Bank*, L. R. 2 Ex. 259, and *Mackay v. The Commercial Bank of New Brunswick*, L. R. 5 P. C. 412.

led L. to believe that it belonged to third persons. The value of rupee paper afterwards became considerably less, but L. held, for many months, what the defendant had sold to him, and ultimately re-sold it at a loss of £43,000. On the trial, judgment was ordered to be entered for the whole amount. The Court of Appeal, on motion for a new trial, held, distinguishing *Brookman v. Rothschild*,¹ that the measure of damages was not the amount of the loss ultimately sustained by L., but the difference between the price which he paid for the rupee paper and the price which he would have received if he had resold it in the market forthwith after purchasing it.²

Where a secret gratuity is given to an agent with the intention of influencing his mind in favor of the giver of the gratuity, and the agent, on subsequently entering into such a contract with such giver on behalf of his principal, is actually influenced by the gra-

¹ 3 Sim. 153; on appeal, 5 Bli. N. s. 165.

² *Waddell v. Blockey*, 4 Q. B. Div. 678. The following is the principle of the decision, by Bramwell, L. J.: "When a person has been defrauded in buying a chattel, and is in a condition to restore it, he is entitled upon discovering the fraud to receive back the price, provided he offers to return the chattel. It may be that if the plaintiff, who represents the insolvent buyer, could have tendered the rupee paper to the defendant, he might have recovered back the whole price. . . . If there could have been a *restitutio in integrum*, possibly the plaintiff in this action might have recovered in full. The question, however, is reduced to this: What damages is the plaintiff entitled to? How much worse off is the estate which he represents owing to the bargain into which the insolvent entered? We may suppose the insolvent to have been an intentional and willing buyer. In fact he bought the rupee paper; he accepted it and used it; that is, sold it. Therefore the plaintiff cannot tender it to the defendant, and the question is one of damages. The right mode of dealing with the damages is to see what it would have cost the insolvent to get out of the situation; that is, what is the price at which he could have sold the paper? Suppose that a horse has been sold with a fraudulent warranty, and suppose the horse is resold with knowledge of the defect, which had been fraudulently concealed, the damages to be recovered would be the difference in the prices obtained at the two sales. Here the question is: What could the insolvent have obtained if he had resold the rupee paper which he had been induced to purchase by the fraud of the defendant? It was for the insolvent to

consider whether he would sell it or retain it. The retention of it was his own voluntary act. If he elected to remain owner after the rupee paper began to fall in price his loss was not owing simply to his having purchased it, but to his having purchased it and retained it. When I say that his loss is to be estimated by the price which he might have obtained upon a resale, I mean that he is entitled to include the commissions which he would have to pay upon the sale and the resale; further, he would not have been bound to resell hastily and unadvisedly, but he ought to have time allowed to him to ascertain what his loss really was. Upon these principles the amount must be calculated at which the damages are to stand." When an agent is employed to buy, it is a fraud if he sells property of his own to a principal who is under the belief that he is dealing with a third party; the agent occupying a fiduciary relation. Upon the discovery of the fraud the principal may annul the contract and recover his damages. *Brookman v. Rothschild*, 3 Sim. 153; 5 Bli. N. s. 165; *Gillet v. Peppercombe*, 3 Beav. 78; *Kimber v. Barber*, L. R. 8 Ch. 56. As to the measure of damages, see *Davidson v. Tulloch*, 3 Macq. 783, 790. In this case it was laid down by Lord Campbell, where the question came up with reference to a sale of stock, that the proper mode of measuring the damages is to ascertain the difference between the purchase-money and what would have been a fair price to be paid for the shares at the time of the purchase. This accords with the holding in *Waddell v. Blockey*, 4 Q. B. Div. 678. See *Twycross v. Grant*, 2 C. P. Div. 469; *Mullett v. Mason*, L. R. 1 C. P. 559.

tuity in assenting to stipulations prejudicial to the interests of his principal, although the gratuity was not given directly with relation to such particular contract, the transaction is fraudulent as against the principal, and the contract is voidable at his option.¹

In *Smith v. Sorby*,¹ which was an action for breach of an agreement by the defendant to supply the plaintiff with coals, the defendant's case was, that there was a secret agreement for payment by the plaintiff to the defendant's agent of a commission which was intended to influence the agent's mind to the prejudice of his employer, in favor of the plaintiff; and that, in fact, it did influence his mind in entering into the agreement for the defendant with the plaintiff. At the trial, Pollock, B., before whom the trial took place, directed the jury that the giving of a commission to an agent, though improper, was not necessarily fraudulent, and that, in order to vitiate the contract on the ground of fraud, there must have been an intention on the part of the party offering the commission to induce the agent in entering into the contract to betray his principal's interests, and the mind of the agent must, in fact, have been corruptly affected by such inducement. This ruling not having been considered satisfactory, a new trial was ordered.

The question was again considered in *Harrington v. Graving Dock Co.*² There, the defendants contracted to pay the plaintiffs a commission for superintending repairs to be executed by them on certain ships belonging to the Great Eastern Ry. Co. The plaintiff, at the time of such contract being made, was in a position of trust in relation to the railway company, having been employed by them as an engineer to advise them as to the repairs, and the contract between defendants and plaintiff was made in part in consideration of a promise that the plaintiff would use his influence with the railway company to induce them to accept the defendant's tender for the repairs of the ships. The jury found that the contract, though calculated to bias the mind of the plaintiff, had not, in fact, done so, and that he had not in consequence thereof given less beneficial advice to the company as to the defendant's tender than he would otherwise have done. The court dealt with the question left undecided in *Smith v. Sorby*; ³ holding that the plaintiff could not maintain an action for commission under the contract, on the ground that, even although the plaintiff had not been induced to act corruptly, the consideration for the contract was corrupt.⁴

¹ *Smith v. Sorby*, 3 Q. B. Div. 552, n.

² 3 Q. B. Div. 549.

³ *Ibid.* 552.

⁴ Cockburn, C. J., in his judgment,

said: "I will assume, for the purposes of argument, that the agreement did not influence the mind of the plaintiff so as to induce him to do anything dishonest to-

*Panama & South Pacific Telegraph Co. v. India Rubber, Gutta Percha & Telegraph Works Co.*¹ is another important case illustrative of the duty which an agent owes to his principal. It was a case where a telegraph work company agreed with a telegraph cable company to lay a cable, the cable to be paid for by a sum payable when the cable was begun, and by twelve instalments payable on certificates by the cable company's engineer, who was named in the contract. Shortly afterwards the engineer, who was engaged to lay other cables for the works company, agreed with them to lay this cable also for a sum of money to be paid to him by instalments payable by the works company when they received the instalments from the cable company. The cable company paid the works company £40,000 as a first payment on Feb. 4, 1870, soon after the contract was made. On Nov. 16, 1870, the works company claimed £90,000 as a further payment, but the cable company refused to recognize their liability. In September, 1871, the cable company's engineer resigned his position, soon after which the cable company discovered that he had entered into the sub-contract with the works company. They filed their bill against the defendants, praying that the contract might be set aside and delivered up to be cancelled; the works company be decreed to repay the plaintiffs the £40,000; and that the engineer be decreed to repay £600 commission which the cable company had paid him. The argument was most elaborate, lasting for several days. The Court of Appeal, Sir W. M. James and Sir G. Mellish, L. JJ., differed on one point of principle in the case; the former taking it to be clear that any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal, cognizable in equity. "That," he says, "I take to be a clear proposition, and I take it, according to my view, to be equally clear that the defrauded principal, if he comes in time, is entitled, at his option, to have the

wards his employers, the Great Eastern Railway Company. I entertain no doubt, however, that when a bribe is given, or a promise of a bribe is made, to a person in the employ of another by some one who has contracted, or is about to contract, with the employer with a view to inducing the person employed to act otherwise than with loyalty and fidelity to his employer, the agreement is a corrupt one, and is not enforceable at law, whatever the actual effect produced on the mind of the person bribed may be. The tendency of such an agreement as this must be to bias the mind of the agent or other person employed, and to lead him to act disloyally to his principal. It is intended by the party who promises

the bribe to have that effect, and the other party knows such is his intention. Such a bargain is obviously corrupt. It would plainly be a contravention of the maxim *e turpi causâ non oritur actio*, and most mischievous, to hold that a man could come into a court of law to enforce such a bargain on the ground that he was not in fact corrupted. It is quite immaterial that the employer was not in fact damaged. It is sufficient that the consideration upon which the promise was made was intended to be a corrupt one." *Harrington v. Graving Dock Co.*, 3 Q. B. Div. 549, 551.

¹ L. R. 10 Ch. Ap. 515.

contract rescinded; or, if he elects not to have it rescinded, to have such other adequate relief as the court may think right to give him." Mellish, L. J., did not acquiesce in this, on principle, rather too wide proposition. He said with reference to it: "I am not quite certain that I go the full length to which the Lord Justice has gone in thinking that, because a person has been a party to a fraudulent act of this kind after the contract was made, the mere fact of his having been guilty of such fraudulent conduct, *supposing that a full remedy for the fraud could be otherwise obtained*, would entitle the other party to say, 'Because you acted fraudulently, therefore I will have nothing more to do with you, and I will not carry out my contract with you.' I am not aware of any authority which has gone to that extent. As far as I know, the consequence of fraud is, that the court will see that the party defrauded obtains, as far as can be given, *full redress for the fraud*."

However, they both agreed that, under the circumstances of this case, as a full redress for the fraud, that the agreement between the works company and the engineer was a fraud which entitled the cable company to have their contract with the works company rescinded, and to receive back the moneys (the £40,000 and the £600) which they had paid under that contract. And it was so decreed.¹

*Kimberly v. Dick*² is a case very similar in principle to *Panama & South Pacific Telegraph Company v. India Rubber, Gutta Percha & Telegraph Works Company*.³ In this case an architect entered into an undertaking with his employer that a house should be erected for a sum not exceeding £15,000, including architect's commission and all expenses, and engaged the services of a builder, who, without being informed of the undertaking, gave an estimate based on quantities given him by the architect, and entered into a contract with the employer for the completion of the work from the architect's plans, and under his superintendence, for £13,690, with power for the architect to order extra works, and with a clause providing that all questions between the parties should be settled by the award of the architect. On a

¹ See, further, *Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99; *Imperial Mercantile Credit Assoc. v. Coleman*, L. R. 6 H. L. 189; *Dunne v. English*, L. R. 18 Eq. 524; *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221; *Randall v. Errington*, 10 Ves. 423; *Onions v. Cohen*, 2 H. & M. 361; *Kemp v. Rose*, 1 Giff. 258; *Kimberley v. Dick*, L. R. 13 Eq. 1; *Pawley v. Turnbull*, 3 Giff. 70; *In re Mar-*

scilles Extension Ry. Co., L. R. 7 Ch. 161; *Ex parte James*, 8 Ves. 337; *Atwood v. Small*, 6 Cl. & F. 232; *Planché v. Colburn*, 8 Bing. 14; *Palmer v. Temple*, 9 A. & E. 508; *Keys v. Harwood*, 2 C. B. 905; *Milner v. Field*, 5 Ex. 829; *Blair v. Bromley*, 2 Ph. 354; *Jervis v. Berridge*, L. R. 8 Ch. 351.

² L. R. 13 Eq. 1.

³ L. R. 10 Ch. Ap. 515.

suit by the builder, claiming to be entitled to be paid by the employer for all quantities executed by him beyond those included in his estimate, and for extra works: it was held, that, on the evidence, the architect was the agent of the employer, that, his undertaking having been concealed from the builder, the arbitration clause in the contract could not be enforced; and that the plaintiff was entitled to an account for what was due to him for any works executed by him under the architect's direction not included in the contract, and for any works so executed under the contract the price for which was not therein included, and for any variations made under the architect's direction of works included in the contract.¹

6. RATIFICATION OF ACTS OF AGENTS.

The general rule as to the effect of a ratification by one, of the unauthorized act of another respecting the property of the former, is well settled. The ratification operates upon the act ratified precisely as though authority to do the act had been previously

¹ The existence of any circumstance calculated to bias the mind of an arbitrator unknown to either of the parties who have submitted to his decision is a sufficient ground for the interference of the court. In *Kemp v. Rose*, 1 Gill. 258, where a builder by his contract bound himself to abide by the decision and certificates of an architect as to the amounts to be paid for the work, not knowing that the architect had given an assurance to the employer that the cost of the building should not exceed a certain specified amount, although he refused to guarantee that amount, the court did not consider the decision of the architect made under such a bias as binding, but gave directions so as to ascertain under the authority of the court how much remained justly due to the plaintiff. In such a case, whether, in fact, the circumstance had any operation in the mind of the arbitrator must, for the most part, be incapable of evidence, and may remain unknown to every human being; perhaps even unknown to himself. It is enough that such a circumstance did exist. The House of Lords considered this question in *Dimes v. Grand Junction Canal*, 3 H. L. Cas. 759, where the question arose in a case where the Lord Chancellor was the owner of shares in a company, and it was held that he was disqualified, on the ground of interest, from sitting as judge in a cause in a matter largely involving the interests of the company; that his decree was therefore voidable, and must be set aside. See *The Queen v. The Commis-*

sioners for the Paving of Cheltenham, 1 Q. B. 467; *Sir John Egerton v. Earl of Derby*, 12 Co. 114; *The Mayor of Hereford's Case*, 1 Salk. 396; *Brookes v. The Earl of Rivers*, Hardres, 503; *Bridgman v. Holt*, Shower, 111; *The King v. Yarpole*, 4 T. R. 71; *Great Charter v. Kennington*, 2 Str. 1173; *The King v. The Justices of Essex*, 5 M. & Sel. 513; *Bonham's Case*, Hob. 85, 87; *City of London v. Wood*, 8 Co. 118. But, in *Ranger v. The Great Western Ry. Co.*, 5 H. L. Cas. 71, where cases of difference were agreed to be left to the engineer of the company, it was held by the House of Lords that the agreement in effect meant that those questions were to be left to the company itself, by its agent, who was the engineer, and, therefore, the fact that the engineer was a shareholder in the company did not affect the validity of the agreement.

Owing to the fiduciary relations existing between them, an agent for sale, who takes an interest in a purchase negotiated by himself, is bound to disclose to his principal the exact nature of his interest, and it is not enough merely to disclose that he has an interest, or to make statements such as would put the principal on inquiry. Connected with this principle it was held in *Dunne v. English*, L. R. 18 Eq. 524, that, in such a case, the burden of proving that a full disclosure was made lies on the agent, and was not discharged merely by the agent swearing that he did so, where his evidence was contradicted by the plaintiff, and not corroborated.

given,¹ except where the rights of third parties have intervened between the act and the ratification.² The retroactive efficacy of

¹ This principle was acted on in *Maclean v. Dunn*, 4 Bing. 722, where it was held that if A., without authority, makes a contract in writing for the purchase of goods by B., and B. subsequently ratifies the contract, such ratification renders A. an agent sufficiently authorized to make the contract under the statute of frauds. It was contended that to take the case out of the statute the agent should have had his authority at the time the contract was entered into. Best, C. J., in dealing with this contention, said: "If such had been the intention of the legislature it would have been expressed more clearly; but the statute only requires some note or memorandum in writing to be signed by the party to be charged, or his agent thereunto lawfully authorized, leaving us to the rules of common law as to the mode in which the agent is to receive his authority. Now in all other cases a subsequent sanction is considered the same thing in effect as assent at the time. *Omnis ratihabitio retrotrahitur et mandato æquiparatur*; and in my opinion the subsequent sanction of a contract, signed by an agent, takes it out of the operation of the statute more satisfactorily than an authority given beforehand. Where the authority is given beforehand the party must trust to his agent; if it be given subsequently to the contract the party knows that all has been done according to his wishes." *Soames v. Spencer*, 1 D. & Ry. 32. In *Foster v. Bates*, 12 M. & W. 226, a sale was made by a person who intended to act as agent for the one, whoever he might be, who should legally represent the estate of the intestate, to whom the goods sold belonged, and the sale was subsequently ratified by the administrator; and it was held that when one means to act as agent for another, a subsequent ratification by the other is always equivalent to a prior command; nor is it any objection that the intended principal was unknown at the time to the person who intended to be the agent. *Hull v. Pickersgill*, 1 Bro. & C. 282. See *Muskett v. Drummond*, 10 B. & C. 157; *Hagedorn v. Oliverson*, 2 M. & Sel. 485; *Nicholls v. Le Feuvre*, 2 Bing. N. C. 81; *Bloxam v. Sanders*, 4 B. & C. 941; *Bailey v. Culverwell*, 8 B. & C. 448; *Buron v. Denman*, 2 Ex. 167; *Whitehead v. Taylor*, 10 A. & E. 210; *Fitchet v. Adams*, 2 Str. 1128; *Wolff v. Horncastle*, 1 B. & P. 317; *Routh v. Thompson*, 11 East, 274; *Wilson v. Tumman*, 6 M. & G. 236; *Wilson v. Barker*, 4 B. & Ad. 614; *Goodtitle v. Woodward*, 3 B. & Ald. 689. An act done for another,

not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him; but where A. does an act *as agent for B.*, without any communication with C., C. cannot afterwards by adopting that act make A. his agent, and thereby incur any liability or take any benefit under the act of A. *Wilson v. Tumman*, 6 M. & G. 236. The same distinction is taken in the Year Book, 7 H. 4, to. 34, pl. 1, that if the bailiff took the heriot, claiming property in it himself, the subsequent agreement of the lord would not amount to a ratification of his authority as bailiff at the time; but if he took it at the time as bailiff of the lord, the subsequent ratification by the lord made him bailiff at the time. It is similarly laid down by Alderson, C. J., in *Godbolt*, 109 b: "If one have cause to distrain my goods, and a stranger, of his own wrong, without any warrant or authority given him by the other, takes my goods, *not as bailiff or servant to the other*, and I bring an action of trespass against him, can he excuse himself by saying that he did it as his bailiff or servant? Can he also father his misdemeanor upon another? He cannot, for once he was a trespasser, and his intent was manifest." So, as to actions *ex contractu*, "The rule as to ratification applies only to the acts of one who professes to act as the agent of a person who afterwards ratifies." *Vere v. Ashby*, 10 B. & C. 298, *per* Parke, J.; *Saunderson v. Griffiths*, 5 B. & C. 909; *Anon.*, 2 Leon. 196; *Fuller & Trimmell's Case*, *Id.* 215; *Hull v. Pickersgill*, 1 Bro. & B. 282; *Governor, &c. of Bristol v. Wait*, 3 N. & M. 359, 368, 369.

² C. & T., merchants at Liverpool, sent orders to I., a merchant at New York, to purchase for them certain goods, which were accordingly shipped by I. in five vessels bound to Liverpool, and consigned to C. & T., who, after the receipt of goods by one of the vessels, stopped payment on April 7, 1846. I. had drawn bills for the goods, partly on C. & T. and partly on B. & Co., with whom C. & T. had dealings. B. & Co., who were merchants at Liverpool, and who also had a house of business in New York, purchased there several of the bills, which were drawn at sixty days' sight, and were dated, some on March 28, and the rest on March 30. On May 8 a fiat in bankruptcy issued against C. & T. The four other vessels, arrived at Liverpool, respectively on May 3, 5, 7, and 9; and immediately on

the ratification is subject to this qualification. The intervening rights of third persons cannot be defeated by the ratification. In other words, it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made.¹ The ratification is

the arrival of each, and while the *transitus* of the goods on board continued, B. & Co., on behalf of I., gave notice to the master and consignees of each ship, claiming to stop the goods *in transitu*. B. & Co. were not the general agents of I., nor had they received from him any authority to make this stoppage. On May 11 the assignees of C. & T. made a formal demand of the goods from the master and consignees of each of the four ships, at the same time tendering the freight; but they refused to deliver them, and on the same day delivered the whole to B. & Co. On the next day the assignees made a formal demand of the goods from B. & Co., but they refused to deliver them up, claiming title under the stoppage *in transitu*. On April 23, I. heard at New York that C. & T. had stopped payment; and on the next day he executed a power of attorney to H. of Liverpool authorizing him to stop the goods *in transitu*. This was received by H. on May 13, and he on that day adopted and confirmed the previous stoppage by B. & Co. I. afterwards adopted and ratified all that had been done both by H. and B. & Co. In trover by the assignees of C. & T. against B. & Co. it was held, first, that there could be no valid stoppage *in transitu* after the formal demand of the goods by the assignee on May 11, and the subsequent delivery of them to the defendants; and, secondly, that the ratification of the stoppages by I. after the conversion by the defendants had not the effect of altering retrospectively the ownership of the goods, which had already vested in the plaintiffs. *Bird v. Brown*, 4 Ex. 786. See *Right v. Cuttrell*, 5 East, 491; *Doe v. Walters*, 10 B. & C. 626; *Waring v. Dewberry*, 1 Str. 97; *Butter & Baker's Case*, 3 Rep. 29 b; *Whitehead v. Anderson*, 9 M. & W. 518; *Nicholls v. Le Feuvre*, 2 Bing. N. C. 81; *Bailey v. Culverwell*, 8 B. & C. 448; *Lord Audley's Case*, Cro. Eliz. 561; *Moore*, 457; *Podger's Case*, 9 Rep. 104 a. The same doctrine was held in *Leber v. Kauffelt*, 5 W. & S. 446, that although a relation will not be allowed to take place so as to divest the right of a third person, or to take away those of the intestate, according to the maxim, *in fictione juris semper consistit equitas* (*Kerrick v. Burges*, Moo. 125; *Murray v. East India Co.*, 5 B. & Ald. 204; *Pratt v.*

Swaine, 8 B. & C. 235; *Parsons v. Mayesden*, Freem. 152; *Mountford v. Gibson*, 4 East, 446), yet that generally the relation back will be admitted for the purpose of supporting the rights of the intestate, and of ratifying acts for the benefit of his estate, and giving a remedy where otherwise there would be none. See *Wood v. McCain*, 7 Ala. 800, 806.

¹ *Cook v. Tullis*, 18 Wall. 332. A person may ratify an action brought in his name, but without his knowledge or authority, by another professing to act as his agent and on his behalf. Therefore, where the holder of a bill of exchange, without the knowledge or authority of the plaintiff, indorsed and delivered it to an attorney for the plaintiff, and in order that an action might be brought upon it in his name; and the plaintiff, after action brought, ratified the act, it was held that the subsequent ratification was equivalent to a prior authority, and that the plaintiff had a valid title to sue on the bill. *Ancona v. Marks*, 7 H. & N. 686. Ratification after action brought is equivalent to a prior command. *Richardson v. The Countess of Oxford*, 2 F. & F. 449; *Hull v. Pickersgill*, 1 Brod. & B. 232. To entitle a person to sue upon a contract it must be shown that he himself made it, or that it was made on his behalf by an agent authorized to act for him at the time, or whose act has been subsequently ratified and adopted by him; and the person for whom the agent professes to act must be capable of being ascertained at the time. *Watson v. Swann*, 11 C. B. N. s. 756. It is not necessary that he should be named; but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound by the contract. Thus S., an insurance broker at Hull, being instructed to effect an open policy for £5000 for the plaintiff, against jettison only, subject to declaration thereafter, and being unable to do so, declared certain deck cargo shipped for Ostend on board one of the plaintiff's vessels on the back of a general policy which he had previously effected for himself "upon any kind of goods and merchandise as interest might appear," and got it initialed by the underwriters. A loss having happened, it was held that it was not competent to the plaintiff to main-

the first proceeding by which the party ratifying becomes a party to the transaction, and he cannot acquire or confer the rights resulting from that transaction, unless in a position to enter directly upon a similar transaction himself. Thus, if an individual pretending to be the agent of another should enter into a contract for the sale of the property of his assumed principal, it would be impossible for the latter to ratify the contract, if, between its date and the attempted ratification, he had himself disposed of the property. He could not defeat the intermediate sale made by himself, and impart validity to the sale made by the pretended agent, for his power over the property or to contract for its sale would be gone.¹ On the same principle, liens by attachment or judgment upon the property of a debtor, are not affected by his subsequent ratification of a previous unauthorized transfer of the property.²

A ratification is, in its effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified.³ To hold otherwise would be equivalent to saying that an agent not having the power to do

tain an action against the underwriters upon this policy, the contract not having been made by him or on his behalf at the time. *Ibid.* See *Powles v. Innes*, 11 M. & W. 10. The same principle was applied in *In re Empress Engineering Co.*, 16 Ch. Div. 125. There A. and B. agreed with C. on behalf of a company intended to be formed, that A. and B. should sell and the company buy a certain business, and it was a term of the agreement that sixty guineas should be paid to J. and P., solicitors, for their expenses and charges in registering the company. The memorandum of association adopted this agreement, and the directors subsequently ratified it. An order having been made for winding up the company, J. and P. claimed to prove for the sixty guineas. It was held that the claim must be disallowed, for that the contract between A. and B. and C., having been entered into before the company was in existence, could not by mere ratification be made binding on the company. In this case Jessel, M. R., said (at p. 128): "The contract between the promoters and the so-called agent for the company of course was not a contract binding upon the company, for the company had then no existence; nor could it become binding on the company by rati-

fication, because it has been decided, and, as it appears to me, well decided, that there cannot in law be an effectual ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence." *Melhado v. Porto Allegre, &c. Ry. Co.*, L. R. 9 C. P. 503; *In re Hereford & South Wales Waggon, &c. Co.*, 2 Ch. Div. 621, are in accord, that a company cannot ratify a contract before it came into existence, — cannot ratify a nullity. And see *Kelner v. Baxter*, L. R. 2 C. P. 174; *Gunn v. London & Lancashire Fire Ins. Co.*, 12 C. B. N. S. 694; *Payne v. The New South Wales, &c. Co.*, 10 Ex. 283; *Hutchinson v. Surrey, &c. Assoc.*, 10 Ex. 283. If the company adopts the act it can only be by way of a new agreement; for they cannot be bound by a contract made by the promoters before the company was registered. *Ibid.*

¹ *McCracken v. City of San Francisco*, 16 Cal. 624.

² *Cook v. Tullis*, 18 Wall. 332; *Taylor v. Robinson*, 14 Cal. 396; *Wood v. McCain*, 7 Ala. 806; *Bird v. Brown*, 4 Ex. 799.

³ *Marsh v. Fulton County*, 10 Wall. 676, 684.

a particular act for his principal, could give validity to such act by its indirect recognition.¹

Where an agent, acting, as he supposes, for the best interest of his distant principal, has, under the circumstances, gone beyond the letter of his instructions, if the principal, when informed by the agent of what has been done, does not choose to affirm the act, it is his duty to give immediate information of his repudiation. He cannot, by holding his peace, and apparent acquiescence, have the benefit of the contract if it should turn out to be profitable, and retain a right to repudiate it if otherwise. The principal must, therefore, when informed, reject within a reasonable time or be deemed to adopt by acquiescence. The rule is said to be a stringent one upon the principal in such cases, where, with full knowledge of the acts of the agent, he receives a benefit from them, and fails to repudiate the acts.²

The case of *Law v. Cross*³ was a purchase of coal by the plaintiff for the defendant, where the agent, intending to act for the benefit of his principal, exceeded his instructions. The coal was

¹ *McCracken v. City of San Francisco*, 16 Cal. 624. See *Despatch Line of Packets v. Bellamy Manuf. Co.*, 12 N. H. 232; *Pratt v. Town of Swanton*, 15 Vt. 147; *Chamberlin v. The Inhabitants of Dover*, 13 Me. 466. The defendant, a naval commander, stationed on the coast of Africa, with instructions to suppress the slave trade, was requested by the Governor of Sierra Leone to obtain the liberation of two British subjects detained as slaves at the Gallinas by the son of the king of that country, and in effecting that object to use force if necessary. He accordingly proceeded to the Gallinas with an armed force, and having landed at Dombocorro took military possession of a barracoen belonging to the plaintiff, who was a Spaniard carrying on the slave trade at the Gallinas. He then communicated with the king of the country, and the two British subjects having been released, the defendant concluded a treaty for the abolition of the slave trade in that country. In execution of the treaty the defendant fired the barracoens of the plaintiff, and carried away his slaves to Sierra Leone, where they were liberated. Some of the plaintiff's goods used in the slave trade were claimed by the king as forfeited, and delivered up to him; other goods were destroyed. These proceedings having been communicated to the Lords of the Admiralty and the Secretaries of State for the foreign and colonial departments, they respectively by letter adopted and ratified the act of the defendant. It was held that the ratification of the defendant's act by the

ministers of state was equivalent to a prior command, and rendered it an act of state, for which the Crown was alone responsible. *Baron v. Denman*, 2 Ex. 167. The effect of this ratification by the Crown was to render the defendant's act an act of state, in respect of which no action can be maintained. *Elphinstone v. Bedreechund*, 1 Knapp, 316. See *Lamb v. Mills*, 4 Mod. 378; *Trevillian v. Pine*, 11 Mod. 112; *Manby v. Long*, 3 Lev. 107, as to ratification of acts of bailiffs, relating back to the time of the act done, under the maxim, *Omnis ratihabitio retrotrahitur et mandato equiparatur*. The Rajah of Tanjore, a native independent sovereign, but, in virtue of treaties, under the protection of the East India Company, died without leaving issue male, when the East India Company, in the exercise of their sovereign power, and in trust for the British Government, seized the Raj of Tanjore, and the whole of the property of the deceased Rajah, as an escheat, on the ground that the dignity of the Raj was extinct for want of a male heir, and that the property of the late Rajah lapsed to the British Government. The government having subsequently ratified the act, it was held that an act done by an agent of the government, though in excess of his authority, being ratified and adopted by the government, the ratification was equivalent to previous authority. The Secretary of State *v. Kamaahoe Boye Sahaba*, 13 Moo. P. C. 22, 86.

² *Hoyt v. Thompson*, 19 N. Y. 218.

³ 1 Black, 533.

shipped to San Francisco, and, on its arrival there, the price of coal having fallen, the defendant's agent assumed the power of repudiating the contract, and set up as a pretence that the coal was not good. The coal was sold for the benefit of whom it might concern, and was bid in by the defendant's agent for a sum which paid the freight only. The question of acquiescence having been left to the jury, they found in favor of the plaintiff, and, on the principles above stated, the Supreme Court of the United States affirmed the judgment of the court below.

Where it was claimed that goods shipped to the defendants, factors, were improperly shipped, the goods belonging to the plaintiffs, the United States Supreme Court held,¹ that though the owners of the goods were not bound by the contract improperly made with reference to their property, by the shippers, yet the owners could elect, after being informed of the nature of the contract, to reject it or adopt it. If, with a full knowledge of the facts concerning it, they ratified it, they thereby made themselves a party to it, as much so as if the original agreement had been made with them. And if they ratified it, no new or additional consideration was required to support the ratification, because in adopting the contract they accepted with it the original consideration on which it was founded, as a sufficient consideration for their adoption of it.²

¹ *Drakely v. Gregg*, 8 Wall. 242.

² *Pearsoll v. Chapin*, 44 Pa. 9; *Kee-nan v. Holloway*, 16 Ala. 53; *Wilmot v. Richardson*, 6 Duer, 328. In *Pearsoll v. Chapin*, 44 Pa. 9, 17, in answer to the contention that if a contract is tainted with fraud, it is incapable of confirmation or ratification without a new contract founded on a new consideration, the court say: "Ratification is in general the adoption of a previously formed contract, notwithstanding a vice that rendered it relatively void; and by the very nature of the act of ratification, confirmation, or affirmance (all of these terms being used to express the same thing), the party confirming becomes a party to the contract; he that was not bound becomes bound by it, and entitled to all the proper benefits of it; he accepts the consideration of the contract as a sufficient consideration for adopting it, and usually this is quite enough to support the ratification. A mere ratification cannot, of course, correct any defect in the terms of the contract. If it is in its very terms invalid for want of consideration, or for any other defect, a mere ratification can add nothing to its binding force."

If an agent to receive payment of a

debt, undertakes to compromise and release it, and his principal refuses to ratify his act or to receive the money, and gives notice thereof to the debtor, and the money paid on the attempted compromise remains in the hands of the agent, it is at the risk of the debtor. *Curtis v. Innerarity*, 6 How. 146. If an agent, A., who has departed from instructions, does not make his principal aware of the fact of departure, the principal cannot be supposed to intend to ratify. If the principal, through another agent, B., abroad, accept and sell a cargo purchased by A. in breach of orders, this may or may not amount to a ratification. But if B. accepted and sold the cargo in pursuance of directions given by the principal in ignorance of a breach of his orders by A., this is not a ratification. *Bell v. Cunningham*, 3 Peters, 69. An authority to an agent to sell property does not empower him to depart from the law in making the title, and if he does so, and the title fails for that cause, the principal is not liable to refund the purchase-money. *Owings v. Hull*, 9 Peters, 607. And no doctrine is better settled, both upon principle and authority, than this; that the ratification of an act of an agent previously author-

Under the constitution act of Queensland, any person who, being disqualified by reason of his having entered into a contract or agreement for and on account of the public service, shall presume to sit or vote in the legislative council or legislative assembly, is liable to the penalty of £500 for each offence. In an action, under this act, against the defendant, a member of the Queensland Legislative Assembly, for a violation of the act, it appeared that M. & Co. had, in 1878, "for and on behalf of the owners of the ship S. H.," but contrary to the express direction of the defendant (one of such owners), concluded a charter-party with the local government; that such charter-party was made in pursuance of an agreement between M. & Co. and the government for the supply of ships of a particular description to carry emigrants, which agreement did not provide for any privity of contract between the owners of such ships and the government; that M. & Co. were the general agents of the defendant to charter ships in which he held shares, and that one of the firm was registered as the managing owner of the S. H.; and that it was neither alleged nor proved that the government ever knew that M. & Co. or any member of that firm had general authority to bind the defendant, and had acted upon the belief that such general authority continued unrestricted. The jury having found for the defendant, the Supreme Court of Queensland refused a rule to set aside the verdict, and, on appeal to the Privy Council, the judgment of the Supreme Court was sustained. The jury having found that the contract, which was made on behalf of the owners, which would include the defendant, was made "contrary to the express directions of the defendant," the House of Lords held that this finding was quite justified by the evidence; that, although the defendant might, on becoming aware of the contract, have ratified it, there was no evidence given that would show he had done anything that would amount to a ratification of the contract, and that it was impossible to hold the defendant bound by a contract, though purporting to be made on his behalf, if made contrary to his express directions.¹

ized, must, in order to bind the principal, be with a full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded in mistake or fraud. *Ibid.*

¹ *Miles v. McIlwraith*, 8 App. Cas. 120. The Privy Council approved, in this case, the principle thus laid down by Parke, B., in *Freeman v. Cooke*, 2 Ex. 654, 663: "If the person means his representation to be acted on, and it is acted upon

accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the

The following is a summary of the principles laid down in *Insurance Co v. McCain*:¹ (1) A principal cannot be allowed to hold out a person as his agent, and then disavow responsibility for his acts. After being once appointed, parties dealing with him have a right to rely upon the continuance of his authority, until in some way informed of its revocation. (2) Special instructions limiting the authority of a general agent whose powers would otherwise be coextensive with the business intrusted to him, must be communicated to the party with whom he deals, or the principal will be bound to the same extent as though such special instructions were not given. (3) After the acts of the agent are communicated to the principal, and he receives and retains the fruit of such acts in silence, such silence will be deemed equivalent to acquiescence.

D., the managing owner of a ship, through the plaintiffs, his agents at Constantinople, sold her to the Turkish Government, and received a bill upon the Oriental Bank in London, for the amount of the purchase-money, which bill was duly paid. D. had no express authority at the time from the defendants (who were the owners of 23-64ths of the ship), to sell her, but the latter knew that a sale was contemplated; and, after the sale, they executed a power of attorney, reciting that they had agreed to sell the vessel to the Turkish Government, and had actually received the purchase-money, and empowering the plaintiffs to transfer their respective shares and to hand over the vessel to the purchasers. The defendants afterwards received from D., or settled in account with him, the value of their respective shares. It was held, by the Common Pleas Division, affirmed, on appeal, by the Court of Appeal, that the jury were warranted in finding that the defendants had authorized the sale of the ship by D., or had, by their subsequent ratification, so adopted his act, as to render them jointly liable to the plaintiffs for the commission due to the latter on the sale; and, also, that the position of the defendants was not so altered by the fact of the plaintiffs having drawn upon D. a bill at three months' date for the amount of the commission,

same effect." In such a case, though the principal does not actually contract, yet the person who thought he did has the option to preclude him from denying that he contracted, if the case is brought within the above rule; the principle being, that a person, having clothed an agent with apparent general authority, but restricting it by secret instructions, is bound (if the other party chooses to hold him so) to one who, in ignorance of the restrictions, contracts through the agent, on the

faith of the agent having the authority he seems to have. *Miles v. Mellwraith*, 8 App. Cas. 120, 133. See *Smith v. McGuire*, 3 H. & N. 554; *Appleton v. Binks*, 5 East, 148; *Norton v. Herron*, Ry. & Mood. 229; *Tauner v. Christian*, 4 E. & B. 591; *Cooke v. Wilson*, 1 C. B. N. s. 153; *Sharland v. Brandt*, 6 Q. B. Div. 93; *Elbinger Actien-Gesellschaft v. Claye*, L. R. 8 Q. B. 318.

¹ 96 U. S. 84.

as to release the former from liability upon the dishonor of the bill.¹

Where there was a formal letter of repudiation of the acts of the agent sent by the principal to the agent, and a private letter, in effect undertaking to ratify the acts of the agent, the principal was held bound, in a case of a sale of shares, by the acts of the agent.²

7. CONSIGNEES, FACTORS' ACTS, ETC.

The relative rights as between the consignee of goods and the ship as to freight and delivery, are set out by the Supreme Court of the United States, in *Brittan v. Barnaby*,³ thus: The word "freight," when not used in a sense to imply the burden or loading of the ship, or the cargo which he has on board, is the hire agreed upon between the owner or master for the carriage of goods from one port or place to another. That hire, without a different stipulation by the parties, is only payable when the merchandise is in readiness to be delivered to the person having the right to receive it. Then the freight must be paid before an actual delivery can be called for. In other words, the rule is, in the absence of any agreement to the contrary, that freight, under an ordinary bill of lading, is only demandable by the owner, master, or consignee of the ship, when he is ready to deliver the goods in the like good order as they were in when they were received on board the ship. Such is the general rule. Neither party can require from the other that the merchandise shipped under one bill of lading shall be put up into parcels for delivery, or for the payment of freight. They may do so by stipulation in the bill of lading or by a subsequent agreement, for either of the purposes just mentioned. The master is bound to deliver the goods in a reasonable time. What may be so depends upon the facilities

¹ *Keay v. Fenwick*, 7 C. P. D. 745. On this last-named point the case followed *Bottomley v. Nuttall*, 5 C. B. N. s. 122. See also, *Thomson v. Davenport*, 9 B. & C. 78; *Paterson v. Gandasequi*, 15 East, 62; *Addison v. Gandasequi*, 4 Taunt. 574; *Robinson v. Wilkinson*, 3 Price, 538; *Ford v. Beech*, 11 Q. B. 852; *Belshaw v. Bush*, 11 C. B. 191.

² *Loring v. Davis*, 32 Ch. Div. 625. It was claimed that the letter undertaking to ratify the agent's contract was indefinite in its character, and was open to a different construction from that which was sought to be placed upon it. But the court, on that point, adopted the law as laid down by Lord Chelmsford, in *Ireland v. Livingston*, L. R. 5 H. L. 416, on the

subject, thus: "Now it appears to me that if a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent *bonâ fide* adopts one of them and acts upon it, it is not competent to the principal to repudiate that act as unauthorized because he meant the order to be read in the other sense of which it is equally capable. It is a fair answer to such an attempt to disown the agent's authority, to tell the principal that the departure from his intention was occasioned by his own fault, and that he should have given his order in clear and unambiguous terms."

³ 21 How. 527, 533.

there may be for the discharge of the cargo at the port of delivery, and the impediments in the way of it. When the shipment is large, or, from the master's storage of it, it cannot be landed in a day, if he lands a part of it, his lien upon the whole gives him the power to ask from the consignee of the merchandise a satisfactory security for the payment of the entire freight as called for by the bill of lading. But a security or arrangement is all that he can ask. He may not demand that the whole freight of the shipment should be paid before the consignee has had the opportunity to examine his goods, to see if the obligations of the bill of lading have been fulfilled by the shipowner. Nor is the ship bound to land an entire shipment in a day, for the proper storage of the goods is the master's care, and he may do it in such a way as may be most advantageous to the ship, taking care that it shall not be done to the injury of the goods, or in such a manner as to produce unreasonable delay in the delivery of them. And when landings of the same shipment are made on different days, if the shipper disregards the notice given to him that such will be the case, and he shall not be present to receive the goods, and has not made an arrangement to secure the payment of the freight, they may be stored for safe keeping at the consignee's expense and risk, in the shipowner's name, to preserve his lien for the freight.

In *Brittan v. Barnaby*,¹ the consignee of the cargo offered to pay the freight of such of the merchandise as had been landed. The consignee of the ship refused to receive it, or to deliver such goods, claiming that he had a right to demand the freight upon the whole shipment, when he was only ready to deliver a part of it. In the assertion of this right, the respondent from day to day warehoused the goods. The court held, that the respondent, having in the first instance demanded the entire freight called for by the bill of lading, without any right to do so, and having refused to deliver the merchandise belonging to the libellant when the last parcel of it was landed on the wharf, and when the freight due upon the whole of it was tendered, on the ground that there were due charges for cartage and stowage, did so without color of law for such refusal, and the respondent was held liable for such charges, and for value of the libellant's merchandise, after freight and primage had been deducted, when it was wrongfully detained from the respondent, with interest from the commencement of the improper detention.²

The plaintiff, by his agent, T., delivered goods at Greenboro', N. C. to be shipped to Columbia, S. C., consigned to T. & R.

¹ 21 How. 527.

² See *Bishop v. Ware*, 3 Camp. 360 ;
Ostrander v. Brown, 15 Johns. 39.

there. The agent, T., was a member of the firm of T. & R., and on delivery of the goods to the defendants, he informed them that the goods were the property of the plaintiff. The goods never left Greensboro', but were sold there without the plaintiff's authority, by T. to M., to whom the goods were delivered. The United States Supreme Court held, affirming the judgment of the Circuit Court, that where it is known that the goods are the property of the shipper, and have been shipped by him for delivery to the consignees as his agents at a distant place, the carrier cannot deliver the goods to such consignees, nor without starting them on their journey; the rule being, that, where the consignor is known to the carrier to be the owner, the carrier must be understood to contract with him only, for his interest, upon such terms as he dictates in regard to the delivery, and that the consignees are to be regarded simply as agents selected by him to receive the goods at a place indicated.¹ But, where the shipper is an agent merely, the rule is different.²

The barque Tangier, a foreign vessel, arrived at the port of Boston, with a cargo of cotton, which she commenced discharging on Monday, April 7, and, on the same day, the master notified the consignees of his readiness to deliver the goods. The unloading continued through the forenoon of Tuesday, when, the cotton not having been removed, the wharf became so full that the work was suspended. Notice was again given to the consignees; and, they still neglecting to remove their cotton, a third notice was added on Wednesday morning. On the afternoon of that day, all the cotton which had been unladen was removed except 325 bales. On Thursday forenoon the unloading was completed. On that day the consignees took away five bales, and postponed taking the rest until the next day, giving as a reason that it was fast-day. About three o'clock, on Thursday afternoon, the cotton on the wharf was consumed or damaged by an accidental fire. The bill of lading was "to deliver, in like good order and condition, at the port of Boston, unto G. & P." The consignees having libelled the vessel, the Circuit Court for Massachusetts held that the vessel was liable for the loss. The United States Supreme Court reversed the decision, holding, *first*, that the goods having been deposited for the consignees in proper

¹ Southern Express Co. v. Dickson, 94 U. S. 549.

² Thompson v. Fargo, 49 N. Y. 185; Duff v. Budd, 3 Brod. & B. 177; Sweet v. Barney, 23 N. Y. 325. See Insurance Co. v. Ruden, 6 Cranch, 338; Jones v. Sims, 6 Porter (Ala.), 162; Dawes v. Peck, 8 T. R. 330; Joseph v. Knox, 3

Camp. 321; King v. Meredith, 2 Camp. 639; Griffith v. Ingledew, 6 S. & R. 429; Davis v. James, 5 Burr. 2680; Moore v. Wilson, 1 T. R. 659; Barrett v. Rogers, 7 Mass. 297; Conard v. Insurance Co., 1 Pet. 444; Craven v. Ryder, 6 Taunt. 433; The Frances, 8 Cranch, 418.

order and condition, at a proper place, at mid-day, on a week day, in good weather, this generally constitutes a good delivery; due notice to remove the goods having been given the consignees. *Secondly*, that as there is no statute or law in Massachusetts which forbids the citizen to labor and pursue his worldly business on any day of the week except on the Lord's day, usually called Sunday,¹ and no well-known usage, from time immemorial, having the force and effect of law in Boston, which requires all men to cease from labor, and compels vessels engaged in foreign commerce to cease from discharging their cargoes, and hinders consignees from receiving them, the fact that the cotton was delivered on the wharf on fast-day placed no greater liability on the vessel than if the goods had been delivered on any other day, and the delivery was good.²

By the terms of a bill of lading of the barque Griffin, goods were shipped deliverable to a consignee at Rio de Janeiro. The goods were not entered on the ship's manifest, in consequence of which, after they had been landed and the duty paid by the consignee, they were seized by the Brazilian Government and confiscated. There was no fraud or bad faith on the part of the master, but it was the result of inattention on the part of the master, and of his ignorance of the laws of the country with which he was trading; with which, the court held,³ it was his duty to have acquainted himself.⁴ The court further held that the appellants were responsible for the miscarriage of their master and agent. Their contract was an absolute one to deliver the cargo safely, the perils of the sea only excepted; and, that, under such a contract, nothing would excuse them for a non-performance, except they had been prevented by some one of those perils,—the act of the libellants, or the law of their country. No exception of a private nature, which was not contained in the contract itself, could be engrafted on it, by implication, as an excuse for its non-performance.⁵ The delivery contemplated by the contract in the bill of lading was a transfer of the property into the power and possession of the consignee. The surrender of possession by the master must be attended with no fact to impair the title or affect the peaceful enjoyment of the property. The failure to enter the property on the manifest was, under the laws of Brazil, a cause

¹ In the case of *Farnum v. Fowle*, 12 Mass. 94, it is said by Parker, C. J., — "There are no fixed and established holidays in Massachusetts, in which all business is suspended, except Sunday."

² The *Barque Tangier*, 23 How. 28. A similar doctrine is established by *Figins v. Willie*, 2 W. Blk. 1186, and *Spar-*

row v. Cooper, *Ib.* 1315. And see *Pater v. Croome*, 7 T. R. 336; *Worthy v. Palter*, 5 Taunt. 180, to the same effect.

³ The *Barque Griffin*, 22 How. 491.

⁴ The *Vixen*, 1 Dod. 145; The *Adams*, Edw. Ad. R. 310.

⁵ *Atkinson v. Ritchie*, 10 East, 533; *Spence v. Chodwick*, 10 Q. B. 516.

of confiscation from the event, and rendered nugatory every effort subsequently to discharge the liability of the ship and owners.¹

Where a consignee, who has sold merchandise of the consignor, and received its proceeds, has accepted bills drawn against those proceeds which are not yet at maturity, or are in the hands of third persons, for value, the right of action by the consignor for those proceeds are suspended until the bills fall due and are dishonored.²

The Mary Eddy arrived at Charleston, with 102 hhds. of sugar and 21 of syrup for M. & Co.; the goods being brought under an ordinary bill of lading. On the arrival of the vessel, the master notified M. & Co. of the arrival of the sugar and syrup, offering to deliver the goods on payment of freight. M. & Co. claimed to

¹ It was held in *Gosling v. Higgins*, 1 Camp. 451, that if goods put on board a ship to be carried from one place to another, are wrongfully seized by the officers of the government, so that they cannot be delivered to the consignee, the owner of the goods has an action for the non-delivery against the owner of the ship, who must seek his remedy over against the officers of the government. So, in *Hill v. Idle*, 4 Camp. 327, the consignee of a particular parcel of goods by a general ship, was held liable to the owner for not taking them from the ship in a reasonable time, although the delay arose from the necessity of procuring an order from the Treasury to land the goods, which order the consignee used the utmost diligence to obtain. In *Barker v. Hodgson*, 3 M. & Sel. 267, it was held, that a charterer of a ship, who covenants to send a cargo alongside at a foreign port, is not excused from sending it alongside, though, in consequence of the prevalence of an infectious disorder at the port, all public intercourse is prohibited by the law at the port, and though he could not have communication without danger of contracting and communicating the disorder. Lord Ellenborough there says, — "The question is, on which side the burden is to fall. If, indeed, the performance of this covenant had been rendered unlawful by the government of this country, the contract would have been dissolved on both sides. And this defendant, as he had been thus compelled to abandon his contract, would have been excused for the non-performance of it, and not liable to damages. But if in consequence of events which happen at a foreign port, the freighter is prevented from furnishing a loading there, which he has contracted to furnish, neither is the contract dissolved, nor is he excused for not performing it, but must answer in damages." See *Blight v. Page*, 3 B. & P.

295, n.; *Hadley v. Clarke*, 8 T. R. 259; *Touteng v. Hubbard*, 3 B. & P. 291; *Evans v. Hutton*, 4 M. & G. 954; *Sjoerds v. Luscombe*, 16 East, 201; *Atkinson v. Ritchie*, 10 East, 533. The rule that has been laid down in *Paradine v. Jane*, *Aleyn*, 26, has often been recognized in courts of law as a sound one; *i. e.*, that when the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract. *Canal Nav. Co. v. Pritchard*, 6 T. R. 750; *Bullock v. Dommitt*, 6 T. R. 650.

² *Black v. Zacharie*, 3 How. 483. The law, which is well settled, is thus laid down by Story, J.: "In respect to the first question, it is plain to us that there was no debt due to Zacharie & Co. at the time when the attachment was made. The supposed debt was for the proceeds of a cargo of sugar and molasses, sold by Black on account of Zacharie & Co. Assuming those proceeds to be due and payable, Zacharie & Co. had drawn certain bills of exchange upon Black, which had been accepted by the latter, for the full amount of those proceeds; and all of those bills had been negotiated to third persons, and were then outstanding, and three of them were not yet due. It is clear, upon principles of law, that this was a suspension of all right of action in Zacharie & Co. until after those bills had become due and dishonored, and were taken up by Zacharie & Co. It amounted to a new credit to Black for the amount of those acceptances, during the running of the bills, and gave Black a complete lien upon those proceeds, for his indemnity against those acceptances, until they were no longer outstanding after they had been dishonored." *Ibid.* p. 510. *Kearslake v. Morgan*, 5 T. R. 513; *Steadman v. Gooch*, 1 Esp. 3; *Belshaw v. Bush*, 11 C. B. 205; *Ford v. Beach*, 11 Q. B. 867.

have the goods first at their store to inspect them there, and not to pay the freight until they had found the goods had suffered no injury during the voyage. The master refused to assent to this, claiming a right to his freight when the goods were delivered on the wharf. While discussion was going on the syrup and 3 hhds. of the sugar were taken to M. & Co.'s store. They refused to pay freight on these or on any until all were in their storehouse. The master discharged the balance of the sugar on the wharf, and notified M. & Co. that, unless the freight were paid, the sugar would remain on the wharf until sunset, and then be stored at the expense and risk of M. & Co. The freight not having been paid, accordingly the sugar was stored. M. & Co. libelled the vessel. After conflicting decisions in the courts below on points involved in the case, the matter was brought on appeal to the Supreme Court of the United States,¹ when the decree of the Circuit Courts dismissing the libel was sustained, the Supreme Court holding, *First*, that the shipowner has a lien on the cargo for the freight, and, consequently, may retain the goods after the arrival of the ship at the port of destination until the payment is made, unless there is some stipulation in the charter-party or bill of lading inconsistent with such right of retention and which displaces the lien.² *Secondly*, that delivery on the wharf is sufficient, if due notice be given to the consignees, and the different consignments be properly separated, so as to be open to inspection and conveniently accessible to their general owners;³ and when the goods, after being so discharged, and the different consignments properly separated, are not accepted by the consignee or owner of the cargo, the carrier should not leave them exposed on the wharf, but should store them in a place of safety, notifying the consignee or owner that they are so stored, subject to the lien of the ship for the freight and charges, and when he has so done he is no longer liable on his contract of affreightment;⁴ and, in such cases, the lien of the master continues, as the goods remain in his constructive possession.⁵

C. & Co. shipped cotton to the defendants, and drew on them, at or about the time of the different shipments, some eight or ten drafts for the taxes on the cotton, in favor of the deputy collector. The defendants were advised, as the drafts were drawn, of the fact of their having been drawn, and wrote to C. & Co. promising to accept them; the letter being shown to the deputy collector. The drafts were indorsed by the deputy collector, to whom they were

¹ The Eddy, 5 Wall. 481.

² Bags of Linseed, 1 Black, 112.

³ Ship Middlesex, 11 Law Repr. n. s. (Mass.) 14.

⁴ Richardson v. Goddard, 23 How. 39;

Hyde v. T. & M. Nav. Co., 5 T. R. 389;

Brittan v. Barnaby, 21 How. 532.

⁵ Ward v. Felton, 1 East, 512.

given, to the collector, the plaintiff, who, as between himself and the government, treated the drafts as payment of the tax, charging himself with the amount. The cotton was also marked as tax-paid cotton, and was allowed to go forward as such. Some of the drafts went in at once and were paid, but six of them, drawn between October, 1866, and February, 1867, did not go in for payment until April, 1867. The defendants then refused to pay, alleging that they had then no cotton belonging to C. & Co.; that the non-presentment of the drafts in due course had led them to suppose that C. & Co. had themselves in some way taken them up, and that the account with them had been settled on that assumption. The plaintiff, in an action to recover on the drafts, alleged to have been accepted by the defendants' letter referred to, recovered judgment. This judgment was, on error, sustained.¹ The court held that the written promise of the defendants to accept the drafts was equivalent to acceptance. After notice of the drawing of the drafts, and after the sale of the cotton, they had so much money in their hands to be applied according to their engagement. There was no stipulation between them and the plaintiff. Their contract was with C. & Co. When the money was received for the cotton they held it in trust for the plaintiff, and their sole duty and business in relation to it was to pay it over on the drafts when called for, according to their agreement. If they paid it to C. & Co., they did so in their own wrong. The fact in no wise affected their liability to the plaintiff, and was not an element in the case to be considered. In no view could they be permitted to keep the money for their own use, or avail themselves of a payment made in violation of the plaintiff's rights and of their duty. They could no more object to the consideration of the drafts than if the money were still in their hands. For the purposes of the case it must be regarded as there when payment of the drafts was demanded.²

The following question came up in *Jewan v. Whitworth*,³ under

¹ *Miltenberger v. Cooke*, 18 Wall. 421.

² The court in delivering judgment thus treated the matter: As between the parties, the tax was paid by the plaintiff for C. & Co. His marking the bales, giving the permit, charging himself with the amount, and reporting it to the government as paid, had that effect. The result was the same to C. & Co. as if so much money had been advanced at their request, and so applied for their benefit. They were permitted to ship the cotton to the defendants, in all respects as if the money had been actually paid, and the requisite vouchers had been given upon the basis of such payment. The *assumpsit* of the

collector supplied the place of the money. No demand has been made by the government against C. & Co. They have had the full benefit of the arrangement. As between them and the plaintiff, the transaction is as if the plaintiff had lent C. & Co. the amount in gold, or silver, or treasury notes, with one hand, and received it back with the other. It has been held that promissory notes given under such circumstances can be enforced by the payee. *Bank v. Dillon*, 30 Vt. 122; *Keeley v. Noyes*, 43 N. H. 211; *Smith v. Mawhood*, 14 M. & W. 463.

³ L. R. 2 Eq. 692.

the English Factors' Acts, 6 Geo. 4, c. 94, and 5 and 6 Vic., c. 39.¹ H., a speculator in cotton, in July, 1854, requested W. to purchase for him, in W.'s name, 400 bales of Egyptian cotton, for delivery in the September following. W. assented, employing for the purpose (with the knowledge of H.), as his broker, C., who knew that W. was acting as agent, and W. became liable on a series of contracts, the first of which was due on Sept. 9. The price of cotton falling, C. refused to carry out the pending arrangements for purchase unless he was secured from loss, and W. applied to H., who, on Sept. 8, promised to give some security, and on Sept. 26, deposited with W., and W. deposited with C., with unconditional power of sale, a bill of lading of a cargo of Surat cotton, of which H. was the consignee from the plaintiffs, a firm at Bombay, as their factor; but H. was not known, either to W. or to C., to be other than the true owner. On the same day C. made a first payment on account of W.'s indebtedness under the contracts; and he continued to make other payments, W. not advancing anything. In October, H. stopped payment. A bill was filed by the plaintiffs claiming the proceeds of the cargo of Surat cotton. W. and C. both denied any notice or knowledge that any other than H. was the absolute owner of the cargo, and C. alleged that but for the transfer and deposit with him of the bill of lading as was done, he should not have completed the contract, and that he accepted the same in the faith that W.'s principals had full right to deal with the documents, and that W. had full power to deposit them. The plaintiffs claimed that the trans-

¹ By 6 Geo. 4, c. 94, § 7, it was enacted that factors or agents intrusted with goods, for the purpose of consignment or sale, are deemed owners, so as to give validity to contracts with persons dealing *bonâ fide* upon the faith of such property. By § 2, persons intrusted with the possession of bills of lading, etc., are deemed owners so as to make valid contracts. This act was amended by 5 & 6 Vic. c. 39. It is there recited that, "whereas advances on the security of goods and merchandise have become an usual and ordinary course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be extended to *bonâ fide* advances upon goods and merchandise as by the said recited act (6 Geo. 4, c. 94) is given to sales, and that owners intrusting agents with the possession of goods and merchandise, or of documents of title thereto, should in all cases where such owners by the said recited act, or otherwise, would be bound by a contract or agreement of

sale, be in like manner bound by any contract or agreement of pledge or lien, for any advances *bonâ fide* made on the security thereof." And, by the first section, it is enacted: "That from and after the passing of this act, any agent who shall thereafter be intrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security, *bonâ fide* made by any person with such agent so intrusted as aforesaid, as well for any original loan, advance, or payment, made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and such contract or agreement shall be binding upon and good against the owner of such goods, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent."

action was not protected by the Factors' Acts, because it was a pledge given to secure an antecedent liability from H. to W. The court held that the deposit of the bill of lading by H. was not made in respect of an antecedent debt of H. to W., within the meaning of the Factors' Acts; and that, having been made by H. in respect of an advance by C., on behalf of W., within the meaning of those acts, it was binding on the plaintiffs.¹

A factor, by pledging goods in his possession or under his control, as agent, for an amount which does not exhaust their value, has not thereby parted with his control over the goods, so as to preclude himself from making a further pledge for the balance of their value, which shall be valid as against the principal under the Factors' Acts. Cotton was consigned for sale by A. to B. B. deposited the bill of lading with C., a broker, and authorized him to receive and sell the cotton, and, subsequently, made a further pledge to D. of the balance of the net proceeds of the cotton by order in writing communicated to and assented to by C. It was held that the pledge to D. was valid as against A. under the Factors' Acts.²

The English Factors' Act (5 and 6 Vic., c. 39) does not apply to pledges for antecedent liabilities (whether they may or may not have ripened into debts), where no actual advance is made at the time of the pledge. Therefore, where H., a factor, pledged goods of his principal to G., *first*, to secure the payment of an acceptance of H. in G.'s hands, not then due, which had been given to protect G.'s liability on a contract as H.'s broker; *secondly*, to repay to G. his loss on a re-sale of goods which G. had purchased for H. in his own name; it was held that the transaction was not protected by the Factors' Act, and, *semble*, that both liabilities were antecedent debts.³ It was claimed that this case came precisely within *Jewan v. Whitworth*;⁴ but this case is distinguished from that, inasmuch as in *Jewan v. Whitworth* there was, as between the pledgor and pledgee of the goods no antecedent liability, and an actual advance was made for which the bill of lading covering the goods was pledged. Here there was no new advance between the parties, but, simply an antecedent liability, and it was immaterial, as far as such "antecedent liability" was concerned, whether it had or had not, so far as the statute was concerned, ripened into a debt.⁵

¹ *Jewan v. Whitworth*, L. R. 2 Eq. 692. See, also, *Learoyd v. Robinson*, 12 M. & W. 745; *Luce v. Prescott*, 1 Atk. 245; *Vancasteel v. Booker*, 2 Ex. 691, and, *per Lord St. Leonards*, in *Navanishaw v. Brownrigg*, 2 De G. M. & G. 441, 450.

² *Portalis v. Tetley*, L. R. 5 Eq. 140.

³ *Macnee v. Gorst*, L. R. 4 Eq. 315.

⁴ L. R. 2 Eq. 692, stated *ante*.

⁵ Under the Factors' Act, 5 & 6 Vic. c. 39, a contract with an agent for the pledge of the goods will be valid as against the principal, though the person dealing

In *Kaltenbach v. Lewis*,¹ a variety of questions came up under the Factors' Acts. The following are the points involved, and the holdings upon them, by the Court of Appeal, varying the decision of Vice-Chancellor Bacon:—

K., in Singapore, was in the habit of consigning to M., in London, for sale. M. employed L. and P., London brokers, in the sale of these goods, and in other extensive sales and purchases, and died in May, 1880, heavily indebted to them on the balance of his account. Shortly before M.'s death, K. had consigned cargoes to M. by several different ships. M. put them in the hands of L. and P. for sale, and pledged to them the several bills of lading for separate advances made by them to him on the respective cargoes. As between K. and M., these pledges were unauthorized and improper; but L. and P. had no notice of any impropriety. One cargo had been sold before M.'s death, but not delivered nor paid for. The others remained unsold at his death, and were not sold until after the commencement of an action by K. to recover them. L. and P. claimed a general lien on the balance of the proceeds of all the cargoes after repayment of the specific advances, resting their claim on an alleged agreement with M. to that effect and on mercantile usage. Held, that neither such agreement nor such usage was established in evidence, and that if it had been, such a general lien could not be claimed under the Factors' Act; and held, that apart from the Factors' Act, K., an undisclosed foreign principal, could not sue L. and P. for the proceeds of goods properly sold by them in M.'s lifetime, or if he could, he could only sue as representing M., and subject to all rights of set-off available against M., and that, therefore, L. and P. were entitled to a lien on the balance of the proceeds of the sold cargo, although it was

with the agent knows him to be only an agent in respect of the goods pledged, provided that the person so dealing acts *bonâ fide* and without notice that the agent is acting *malâ fide* and beyond his authority. To deprive the pledgee of the protection of the act, he must be fixed with knowledge that the agent is acting *malâ fide*, and no mere suspicion will amount to notice; nor will the knowledge that the agent has power to sell the goods constitute notice that he has not power to pledge them. *Navanishaw v. Brownrigg*, 2 De G. M. & G. 441. But in *Evans v. Trueman*, 1 Moo. & R. 10, it was held, that a party receiving East India warrants from a factor in pledge for moneys advanced to him, cannot retain them, under 6 Geo. 4, c. 94, against the true owner, if from the circumstances he must, as a reasonable man, have known them not to belong to the factor; although no

direct communication of that fact is made to him. Lord Tenterden, in so deciding, said: "The expression of the statute is, that a party is to be entitled to its protection, if 'he shall not have notice,' by the documents or otherwise, that the pledger was not the actual and *bonâ fide* owner of the goods pledged. A person may have knowledge of a fact either by direct communication, or by being aware of circumstances which must lead a reasonable man, applying his mind to them, and judging from them, to the conclusion that the fact is so. Knowledge acquired in either of these ways is enough, I think, to exclude a party from the benefit of the provisions of this statute: slight suspicion, I think, will not." See *Gill v. Kymer*, 5 Moore, 503; *Haynes v. Foster*, 2 Cr. & M. 237; *Stedman v. Martinant*, 13 East, 427; *Ex parte Skinner*, 1 Deac. & Ch. 403.

¹ 24 Ch. Div. 54.

not delivered or paid for in M.'s lifetime. And held, that as regards the goods unsold at M.'s death, K. was entitled to them subject only to the payment of the sums for which they were respectively specifically pledged. L. and P. bought goods for M., not disclosing the fact that they bought as agents and were therefore as between them and the vendors personally liable to pay. On the day before the day of payment M. asked L. and P. to make him an advance on the security of one of K.'s cargoes, to enable him to pay for those goods. L. and P. did so, and the goods were thus paid for through L. and P. They knew that the cargo pledged did not belong to M., but nothing further; and they did not know whether the goods bought by M. were bought on his own account or not. Held, that as M. was not at the time of the advance indebted to L. and P. in respect of the goods bought, though they were sureties for the payment, the pledge was not a pledge to secure an antecedent debt within the meaning of the Factors' Act, and was valid, there being nothing in the circumstances to give them notice that M. was violating his duty to his principal.¹

On appeal of the case to the House of Lords,² it was held, in this respect affirming the decision of the Court of Appeal, that the obligation under which M. lay to the respondents to pay the deposits and thus prevent their being called upon to pay them, did not constitute an antecedent debt within the meaning of the Fac-

¹ Lindley, L. J., in delivering the judgment of the Court of Appeal, thus summarized the law in its application to this case. He says: "The present case may, in our opinion, be shortly summed up in the following manner. *First*, a person receiving goods from an agent can acquire from the agent all such title as the agent had in the goods by reason of lien for advances or otherwise; all such title as the agent had express authority to create, and all such title as the agent has authority to create by the law or custom of the country where the agency is to be exercised; but, as a general rule, the person taking such goods can get no better title than one or other of them. Here Meyer had no interest in the goods by reason of advances; he had no express authority to pledge the goods for his own debt; no custom has been proved authorizing him so to do even if it were valid; and, consequently, the defendant's only title as regards the goods is under the Factors' Acts. *Secondly*, although an agent authorized to receive money for a disclosed principal can only validly receive it in cash and disengaged from any other relations between payer and payee, an agent for sale authorized to employ in his own name a broker or other

sub-agent in effecting the sale may be satisfied by set-off or in any other manner in which a debt may be discharged as between the agent and sub-agent. Here Meyer was authorized to employ the defendants in his own name, and they are therefore entitled to satisfy by set-off the debt arising from the sale of the plaintiff's goods during Meyer's lifetime. *Thirdly*, that the authority given by Meyer to the defendants to sell the goods was withdrawn by his death and the commencement of this action, and consequently that in respect of the moneys arising from the sales subsequent to these events the defendants have no right of set-off. The plaintiffs are, therefore, entitled to the moneys produced by the sale of the goods consigned by the Soteria, Lansdowne, and Glen Callach, after deducting from those moneys respectively the sums of £200 and £800 advanced by the defendants on these goods respectively. As regards the claim of the plaintiffs to the proceeds of the goods consigned by the Beaconsfield, the Anteeoe, and the Comus, the action must be dismissed." *Kaltenbach v. Lewis*, 24 Ch. Div. 54, 83.

² *Kaltenbach v. Lewis*, 10 App. Cas. 617.

tors' Act, 5 and 6 Vic., c. 39, § 3, and that the pledges were made in respect of *bond fide* advances, and not of antecedent debts, and were valid against the appellants. But, with reference to the goods which had been sold for M. by the respondents, but not delivered to the purchasers nor paid for when M. died insolvent indebted to the respondents on general account, the House of Lords held, reversing in this respect the decision of the Court of Appeal, that, after repayment of the respondent's advance, the surplus proceeds of sale belonged to the appellants; that the appellants could sue the respondents for such surplus, whether on the ground of privity of contract, or on the ground of property, or under the Factors' Act, 5 and 6 Vic., c. 39, § 7.¹

S., who had for many years traded as a timber merchant in his own name, entered into an agreement with F. & Co., who were also timber merchants, to carry on his business thenceforth as their agent at a remuneration by way of a share of profits. The business was thenceforth carried on under this agreement, but in the name of S., as before. S. dealt with the timber in his possession as if he were the absolute owner of it (except as between himself and F. & Co.), and there was nothing done to inform the outside world of the change which had taken place. In the course of the business F. & Co. drew bills on S., which he accepted in his own name, to be protected by F. & Co. Both F. & Co., and afterwards, S., filed liquidation petitions. Before S.'s liquidation, F. & Co.'s trustee demanded the timber in his hands, which was refused. Held, that, to the extent of the current bills S.'s estate had a lien on the timber; and, *semble*, the reputed ownership clause applies to goods in the hands of a factor, unless the relation of principal and factor is notorious.²

An agent "intrusted with and in possession of" goods, or of the documents of title to goods, within the Factors' Acts, is a person who is intrusted as agent for sale; and, consequently, one whose authority has been revoked cannot make a valid pledge of goods which had been intrusted to him for sale, but which he has wrongfully retained after his authority had been revoked, and the goods demanded from him by his principal.³

¹ See New Zealand & Australian Land Co. v. Watson, 5 Q. B. Div. 474; 7 Q. B. Div. 374; Duclos v. Ryland, cited in note to Gill v. Kymer, 5 Moo. 518; Moore v. Clementson, 2 Camp. 22; Mildred v. Maspons, 8 App. Cas. 874; Leuckart v. Cooper, 3 Scott, 521; Learoyd v. Robinson, 12 M. & W. 745; Phillips v. Heath, 6 M. & W. 572; Macnee v. Gorst, L. R. 4 Eq. 315.

² *In re Fawens, Ex parte Buek*, 3 Ch.

Div. 795. See *In re Pavy's, &c. Co.* 1 Ch. Div. 631; *Ex parte Watkins*, L. R. 8 Ch. 520, 528; *Ex parte Boden*, 28 L. T. N. S. 174; *Bock v. Gorrisen*, 2 De G. F. & J. 434; *Ex parte Moldant*, 3 Dea. & Ch. 351; *In re Kulberg*, 9 L. T. N. S. 460; *Ex parte Ward*, L. R. 8 Ch. 144; *Ex parte Montagu*, 1 Ch. Div. 554.

³ *Fuentes v. Montis*, L. R. 3 C. P. 268; affirmed, on appeal, in the Exchequer Chamber; L. R. 4 C. P. 93. A., a

A warehouse keeper who has goods deposited with him as such is not "an agent intrusted with the possession" of them, within the Factors' Act (5 & 6 Vic. c. 39), although he is also a broker, and is usually employed to sell the goods, but always upon specific instructions for that purpose received from the principal.¹

In this case, one Slee carried on the business of a sheep's wool broker in Liverpool, and also that of a warehouse-keeper. In his capacity of warehouse-keeper he was in the habit of receiving from the plaintiffs, merchants in London, bills of lading for sheep's wool and goats' wool, to arrive in Liverpool, which, when landed, was deposited in his warehouses under directions to send the plaintiff a report and valuation, but he was not authorized to sell without specific instructions. The sheep's wool so deposited with him was usually sold by Slee, and the proceeds received by him for the plaintiffs. The goats' wool Slee never sold, he not being a goats' wool broker. Having wools of the plaintiffs of both descriptions in his warehouse, but not having received any instructions as to the sale of either, Slee professed to pledge the whole with the defendants, bankers in Liverpool, by a letter, in which he undertook to hold them as trustee for the defendants, bankers in Liverpool, to secure the sum advanced. It was held by the Exchequer Chamber, affirming the judgment of the Court of Common Pleas, that Slee was not, as to any of the wools so agreed to be pledged, "an agent intrusted with the possession" within the Factors' Act.²

factor, after depositing dock-warrants with the defendant as a security for an advance of money, withdrew them from the defendant's hands, and substituted other dock-warrants for silk belonging to the plaintiff, the defendant having no notice that A. was not the true owner. It was held, that this transaction was not protected by the second section of the Factors' Act (6 Geo. 4, c. 94), there being no advance of money on the faith of such warrants; and that the plaintiff might recover the value of such silk in trover. *Bonzi v. Stewart*, 4 M. & G. 295. It was held by the Court of Exchequer in *Phillips v. Huth*, 6 M. & W. 572, and afterwards by the Exchequer Chamber and the House of Lords in *Hatfield v. Phillips*, 9 M. & W. 647; 12 Cl. & F. 343, that it does not necessarily follow that the factor is intrusted merely because he is found in possession of the symbol of title: it must be shown that the principal really intended that the factor should be possessed of the goods at the time he pledges them. And see *Smart v. Sanders*, 5 C. B. 895; *Jenkins v. Osborne*, 7 M. & G. 678; *Monk v. Whittenbury*, 2 B. & Ad. 484;

Baines v. Swainson, 4 B. & S. 270; *Kingsford v. Merry*, 11 Ex. 577; 1 H. & N. 503; *Trueman v. Loder*, 11 A. & E. 589; *Greening v. Clark*, 4 B. & C. 316; *Taylor v. Kymer*, 3 B. & Ad. 320. Under the old law, a factor intrusted with goods or their symbols for the purpose of sale, could not lawfully pawn either; and if he did, the owner might recover them from the pawnee, although the latter might have had no notice that the factor was not the true owner. *Paterson v. Tash*, 2 Str. 1178; 15 East, 44. And see *Daubigny v. Duval*, 5 T. R. 604; *De-Bouchot v. Goldsmid*, 5 Ves. 211; *Martini v. Coles*, 1 M. & S. 140; *Shipley v. Kymer*, *Ib.* 484; *Solly v. Rathbone*, 2 M. & S. 298; *Cockran v. Irlam*, *Ib.* 301, n.; *Barton v. Williams*, 5 B. & Ad. 395.

¹ *Cole v. North Western Bank*, L. R. 9 C. P. 470; affirmed, on error, by the Exchequer Chamber, L. R. 10 C. P. 354.

² The principle upon which the case was decided is contained in the following, by Blackburn, J. *Ibid.* 372. He says: "The general rule of law is, that, where a person is deceived by another into

In 1866, Vickers of Manchester, ordered 800 tons of pig-iron from the Carron Company; and while they held it at his disposal,

believing he may safely deal with property, he bears the loss, unless he can show that he was misled by the act of the true owner. The legislature seem to us to have wished to make it the law, that, where a third person has intrusted goods or the documents of title to goods to an agent, who in the course of such agency sells or pledges, he should be deemed by that act to have misled any one who *bonâ fide* deals with the agent and makes a purchase from or an advance to him without notice that he was not authorized to sell or to procure the advance. And we think that, if this was the intention, it was carried out by the enactments. We do not think that it was wished to make the owner of goods lose his property, if he trusted the possession to a person who in some other capacity made sales, in case that person sold them. If such was the wish of those who framed the act, we think they have not used language sufficient to express an intention so to enact."

In *Wilkinson v. King*, 2 Camp. 335, the owner of goods sent them to a wharfinger, where goods of the same sort were usually sold. The wharfinger, without any authority, sold them to a *bonâ fide* purchaser who duly paid for them. Lord Ellenborough held that trover would lie against the purchaser, for the goods, as the sale did not change the property in them, and observed that to hold otherwise would give wharfingers the dominion over all goods intrusted to them. This decision was adhered to by Lord Ellenborough in subsequent cases, after full argument. See note to *Ibid.* 336. This case was cited in *Pickering v. Busk*, 15 East, 38, where a purchaser of hemp lying at wharves in London, had, at the time of his purchase, the hemp transferred in the wharfinger's books into the name of the broker who effected the purchase for him, and whose ordinary business it was to buy and sell hemp. This was held to give the broker an implied authority to sell it, and that his sale and receipt of the money bound his unknown principals. So, if it be transferred into the name of "P. or S.;" that is, of the principal or broker. Lord Ellenborough, in this case, distinguished *Wilkinson v. King*, 2 Camp. 335, as a case of a wharfinger, whose proper business was not to sell, and to whom the goods were sent for the mere purpose of custody. In holding, in *Pickering v. Busk*, 15 East, 43, that the broker had been, by the express acts of the owner of the goods, clothed with an implied authority to sell them, Lord Ellenborough showed that

such a case was one where "the apparent authority is the real authority;" thus, "Strangers can only look to the acts of the parties, and to the external indicia of property, and not to the private communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine, that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject-matter; and there would be no safety in mercantile transactions if he could not. If the principal send his commodity to a place, where it is the ordinary business of the person to whom it is consigned to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one send goods to an auction-room, can it be supposed that he sent them thither merely for safe custody? Where the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe. . . . The sale was made by a person who had all the *indicia* of property; the hemp could only have been transferred into his name for the purpose of sale; and the party who has so transferred it cannot now rescind the contract. If the plaintiff had intended to retain the dominion over the hemp, he should have placed it in the wharfinger's books in his own name." So, in *Parker v. Patrick*, 5 T. R. 175, it was held, that where the owner, who had enabled another person to deal with the goods as his own, must abide the consequence if any loss occur by third persons dealing with such apparent owner.

The case of *Phillips v. Huth*, 6 M. & W. 572, is a valuable one in the matter. There, the plaintiffs, owners of a cargo of tobacco, on the arrival of the vessel placed the bill of lading, indorsed in blank, in the hands of W., as their factor, for sale. W. entered the goods at the custom-house in his own name, and, before the cargo was weighed, and without the plaintiffs' knowledge, obtained a dock-warrant for it

he employed Campbell Brothers, of Glasgow, to sell it for him. On March 26, 1866, they wrote to him: "We can now get you your

in his own name. W. had previously agreed with the defendants for the advance to him (W.), of £20,000, on the deposit of other dock-warrants as a security. The defendants, thinking that security insufficient, refused to advance more than £12,000; whereupon, W. pledged with them the dock-warrant of the plaintiffs' tobacco, as a security for, and obtained thereon, the remaining £8000; the jury finding that the plaintiffs intrusted the warrants to W., and that defendants, in making the advances to W. believed that he was the true owner of the tobacco. It was held that, under the circumstances, it did not sufficiently appear that W. was *intrusted* with this dock-warrant, within the meaning of the Factors' Act, 6 Geo. 4, c. 94, § 2, and, therefore, that the plaintiffs were entitled to recover from the defendants the proceeds of the tobacco, which was sold by the defendants, on W.'s becoming bankrupt. In order to make the factor a party *intrusted* with the dock-warrant, within the meaning of the act, it must appear that the owner of the goods *intended* that the factor should be possessed of it at the time of the pledge, or that he should exercise the power, which the possession of the bill of lading gave him, of obtaining the dock-warrants whenever he in his discretion might think fit. The law is so well laid down by Parke, B., in delivering the judgment of the court, and the reasoning is so applicable, not only to questions under the Factors' Acts, but as to the principles governing the relation of principal and agent generally, that we quote from the judgment at length. Parke, B., says: "Before the passing of the 6 Geo. 4, c. 94, commonly called the Factors' Act, or rather the previous Factors' Act, the 4 Geo. 4, c. 83, it was clearly settled, that a factor, or agent for sale, had no power to pledge, whether he was in possession either of the goods themselves, or of the symbol of the goods, and even though the symbol might bear on the face of it some evidence of the property being in himself, as in the case of a bill of lading, in which he was the consignee or indorsee. This was in accordance with the general rule, that he who deals with one *ex mandato* can obtain from him no better title than his *mandate* enables him to bestow. [This, notice, is at common law, and is entirely opposed to the unsound doctrine laid down in the New York case of *Armour v. Michigan Central R. R. Co.*, 65 N. Y. 111, which we have discussed so fully, *post*, Vol. II., Book III., Part I.] But this rule was thought

by some to be attended with hardship on merchants and others dealing with factors, on the faith of their being principals; and the legislature, by the 4 Geo. 4, first relaxed this rule, and by the 6 Geo. 4, extended that relaxation. The question turns upon the second section of the 6 Geo. 4, which provides, that any person *intrusted* with and in possession of any bill of lading, dock-warrant, etc., shall be deemed and taken to be the true owner of the goods described and mentioned in these documents, so far as to give validity to any contract or agreement entered into by the person *so intrusted* and in possession, with any other person, for the sale, disposition, deposit, or pledge of such goods, as security for any money, or negotiable instrument, advanced or given by such other person, on the faith of such document, provided he shall not have notice by the document or otherwise that the person *so intrusted* shall not be the true owner. It is very clear that this section relaxes the rule of the common law, only with respect to those who deal with persons who are not merely in possession of, but are also *intrusted* with the symbol of property. However great the hardship may be on innocent persons, and whatever they may have supposed from finding another in possession of a document bearing the *indicia* of property in itself, still the statute does not apply, and they can acquire no title by virtue of it, unless the document has been *intrusted* to that person. If the legislature had intended to make the simple possession of such instruments sufficient to enable the party having them to make a good title, they no doubt would have so provided. If they had, the innocent party dealing with them would have been protected, but the innocent owner would, in that case, have suffered, if the document had been taken from him by felony or fraud. But by providing that a person should be *intrusted* as well as in possession, the inconvenience is obviated. The statute applies only to written documents relating to goods, and not to goods themselves; and for this reason, — these documents may be made to designate the owner's name, which the goods themselves, generally speaking, cannot; and it is clear that the legislature intended that those persons only should suffer by the frauds of their agents, who have intrusted them with the evidence of title, and omitted to take those precautions which might have prevented them from deceiving others. It is therefore ne-

price." He agreed; and on the 28th, sent them an order in the following terms: "To the Carron Company. Please deliver to

cessary, in order to give effect to this clause, that the owner should have '*intrusted*' the factor with the document; not that it is necessary that the owner should have had personal possession of the document, so as to be able to mark it with his own name, and himself delivered it to the factor; for if his own agent, general or special, puts it into the hands of the factor with the factor's name on it, or if the factor be instructed by the owner to obtain the document in that state, and does so, no doubt he is '*intrusted*' by the owner with it, within the meaning of the act. But in order to constitute an '*intrusting*' of such a document, it is necessary that the owner should have intended the factor to possess it in that form, at the time when he had the possession. '*Intrusting*' with the document is essentially different from '*enabling*' a person to become possessed of it, — from giving him the means of obtaining it. An instance of the difference was well put in the argument, when it was said, that one who gives another the key of his bureau to get out one paper, may enable him to procure any other that he pleases to take, but does not '*intrust*' him with it. It is not enough, therefore, to show that the plaintiffs empowered W. to possess himself of the warrants whenever he chose; it must be shown that the plaintiffs really '*intended*' that the factors should be possessed of them at the time they pledged them; or it must be shown that the plaintiffs meant them not merely to have the power which the possession of the bill of lading would give, — of getting the warrants when they liked, — but to exercise that power by obtaining them whenever, in their discretion, they might think fit. If either of these intentions were proved, it would be sufficient; but if the factors were proved to be in possession of the warrants, under such circumstances as that the plaintiffs, if they had been informed of that fact, might justly have said, 'We never meant this,' it is impossible to say that they intrusted the factors with these warrants. The principals can never be deemed to have '*intrusted*' the agents with a document which the agents obtained in breach of

their trust against the intention of their principals, in violation of their duty towards them, and which document never would have existed at all, if it had not been for the fraud of the agents against their employers. It was well observed, that it is impossible to suppose a confidence reposed by the employer with respect to a document, the very existence of which is a fraud upon him. It is, no doubt, true, that the fact of the delivery of the bills of lading for the purposes of entering the cargoes, of obtaining the warrants, is, as was insisted, some evidence of the intention of the plaintiffs, that the factors should have those warrants at some time, or that the plaintiffs meant them to take them when they pleased; but it is evidence merely; and independently of the objection insisted upon on the part of the plaintiffs, that the construction of the act of Parliament ought to have been more fully explained to the jury, we think that if it had been, the finding of the jury upon that evidence in this case is not satisfactory." The rule for setting aside the verdict for the defendants, and for a new trial, was accordingly made absolute. (a)

Phillips v. Huth, 6 M. & W. 572, was affirmed in *Hatfield v. Phillips*, 9 M. & W. 647, in the Exchequer Chamber, and by the House of Lords, *Hatfield v. Phillips*, 12 Cl. & F. 343. After this decision, the statute 5 & 6 Vic. c. 39, was passed. In *Lamb v. Attenborough*, 1 B. & S. 831, it was held that the Factors' Acts, 6 Geo. 4. c. 94, and 5 & 6 Vic. c. 39, do not apply to the case of master and servant; and, therefore, where a wine merchant gave authority to his clerk to sign delivery orders in his master's name, and receive dock-warrants in his own, which he likewise authorized him to pledge for the purposes of the master's business, the clerk having fraudulently deposited some of these dock-warrants with a pawnbroker as a security for money *bond fide* lent to him, it was held that the clerk was not an agent within the Factors' Acts, and, consequently, that the merchant was entitled to recover the dock-warrants from the pawnbroker. (b)

But, in *Baines v. Swainson*, 4 B. & S.

(a) It is noteworthy that the plaintiffs in this case, and in *Hatfield v. Phillips*, 12 Cl. & F. 359, as stated by the Lord Chancellor in the House of Lords, were *foreign* principals, but this did not affect their right, against the wrong acts of their domestic agents, to follow their property in the hands of innocent third par-

ties, precisely as they might have done if they had been *home* principals.

(b) We would mention here, *en passant*, that this class of cases, too, shows the unsoundness of the New York case of *Armour v. Michigan Central R. R. Co.*, 65 N. Y. 111, and the utter fallacy of the principle relating to the law of principal

Messrs. Campbell Brothers." Campbell Brothers, instead of employing the document for the purpose of giving delivery to the supposed purchaser, represented it as their own, and asked Hertz of Glasgow to make them an advance upon it. Hertz declined till the document should be stamped, and a place of delivery inserted by Vickers. These requirements having been satisfied by Vickers, the Carron Company wrote to Hertz, saying:

270, the plaintiffs, cloth manufacturers, were applied to by E., who was a factor and commission agent, for a sample of their cloths, on the representation that he could get them a purchaser. The sample having been sent, E. afterwards told the plaintiffs that he had got them an order for a certain number of ends at a stated price. The plaintiffs required to know the firm, and S. being mentioned as the firm, they sent the ends to the warehouse of E., who was to pass them on to S., after seeing the process of perching performed upon them, for which he was to receive a commission from the plaintiffs of one shilling per end. E. had no authority from S., and he sold the goods to the defendants, who were cloth merchants, and bought them *bona fide*. It was held that E. was an agent "intrusted" with the cloths within the meaning of the Factors' Acts, and consequently the purchase of them from E. by the defendants was protected. All of the judges distinctly upheld *Monk v. Whittenbury*, 2 B. & Ad. 484, and treated it as an existing authority under the 5 & 6 Vic. c. 39. See *per* Lord Coleridge, in *Cole v. Northwestern Bank*, L. R. 9 C. P. 485. The distinction was taken by Wigram, V. C., in *Wood v. Rowcliffe*, 6 Hare, 183, 191, approved by Crompton, J., in *Baines v. Swainson*, 4 B. & S. 270, 283, as the right distinction, that the act applies only to mercantile transactions, and not to the case of advances made upon the security of furniture used in a furnished house—not in the way of trade—to the apparent owner of such furniture, such apparent owner afterwards appearing to be the agent intrusted with the custody of the furniture

by the true owner. Such "agent" is not an agent within the meaning of the 5 & 6 Vic. c. 39. This case also follows *Monk v. Whittenbury*, 2 B. & Ad. 484, as a decision as applicable to the Act of Victoria as to that of George 4. And see *Fuentes v. Martis*, L. R. 3 C. P. 265; L. R. 4 C. P. 93; *George v. Claggett*, 7 T. R. 359; *Rabone v. Williams*, *Ib.* 360, n.; *Semenza v. Brinsley*, 18 C. B. N. S. 467; *Langton v. Waring*, *Ib.* N. S. 315, 329; *Vickers v. Hertz*, L. R. 2 Sc. Ap. 113; *Portalis v. Tetley*, L. R. 5 Eq. 140; *Leahey v. Robinson*, 12 M. & W. 745; *Navalshaw v. Brownrigg*, 2 De G. M. & G. 441; *Higgins v. Burton*, 26 L. J. Ex. 342; *Taylor v. Kymer*, 3 B. & Ad. 320; *Bonzi v. Stewart*, 4 M. & G. 295; *Heyman v. Flewker*, 13 C. B. N. S. 519; *Jenkyns v. Osborne*, 7 M. & G. 678; *McEwan v. Smith*, 2 H. L. Cas. 309; *Kriegsfeld v. Merry*, 1 H. & N. 503; *Hardman v. Booth*, 1 H. & C. 803; *Sheppard v. Union Bank of London*, 7 H. & N. 661. A sale or pledge, made without title or authority, does not at common law pass any right of property in chattels, even when the party by whom it is made has possession, not merely of the chattels themselves, but of the bills of lading or other documents which usually accompany the title. See *McCormie v. Davis*, 7 East, 5; *Dyer v. Pearson*, 3 B. & C. 38; *Fletcher v. Heath*, 7 B. & C. 517; *Paterson v. Tash*, 2 Str. 1178; *Evans v. Truman*, 2 B. & Ad. 886; *Williams v. Barton*, 3 Bing. 139; *Everett v. Saltus*, 15 Wend. 275; 20 Wend. 268; *Williams v. Merle*, 11 Wend. 84; *Leckey v. McDermot*, 8 S. & R. 500; *Easton v. Worthington*, 5 S. & R. 130.

and agent on which that case was decided. Cockburn, C. J., makes this very plain where he says: "I entertain no doubt that this case is not within either of the Factors' Acts referred to. The relation between the parties here was that of master and servant, not that of principal and agent. Bryant, being the clerk, and in that sense the servant, of the plaintiff, had authority to sign delivery orders on his behalf, and give them to persons dealing with the plaintiff, in the course of

his business; and, acting on that authority, he, in fraud of his principal, assigned some away. The plaintiff would, of course, be concluded by what his servant did *by his authority*, but he is bound no farther; and, consequently, when we find these dock-warrants were parted with by his servant without his authority, they still remain his property, and he is entitled to recover them from the party to whom they were pledged." *Lamb v. Attenborough*, 1 B. & S. at p. 835. See *post*, Vol. II. Book III. Part I.

“We have placed the pig-iron indorsed by Thomas Vickers, Esq., to your credit.” Hertz thereupon advanced to Campbell Brothers three distinct sums, amounting in all to £2400. The act of Campbell Brothers was a gross fraud upon Vickers, who knew nothing of the transfer to Hertz, although he had unsuspectingly facilitated its accomplishment. Campbell Brothers, having become bankrupt, absconded. An action was brought in Scotland by Vickers against Hertz for the delivery of the iron. In *Pochin v. Robinows*,¹ the Scotch Court of Session expressed a doubt as to whether the Factors’ Acts applied to Scotland, and in *Vickers v. Hertz* (not reported in the court below), not relying on the Factors’ Acts, but following their own decision in *Pochin v. Robinows*, they gave judgment for the defendant, on the ground that the documents which had been placed in the hands of Campbell Brothers by the plaintiff, had put them in possession of a right which they were entitled to transmit to others. On appeal to the House of Lords, the judgment below was affirmed, but simply on the ground that the Factors’ Acts do apply to Scotland, and that the documents in this case come expressly within the third and fourth sections of the act,² where it is enacted that, “Any agent intrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be the owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security *bonâ fide* made with such agent so intrusted;” and “that any order for the delivery of the goods, or any other document used in the ordinary course of business as proof of the possession or control of goods, shall be deemed and taken to be a document of title within the meaning of this act.”³

¹ Ct. of Sess. Cas. 3d series, vol. vii. p. 622.

² 5 & 6 Vic. c. 39.

³ *Vickers v. Hertz*, L. R. 2 Sc. & D. Ap. 113. Lord Chelmsford says: “It was objected that the delivery orders were not within the acts, because there were no specific goods to which they were applicable, and because Campbell Brothers were not intrusted with the delivery orders for sale of the goods to which they related. There appears to me no ground for these objections. The orders were for the delivery of specific quantities of iron which had been previously purchased by Vickers, and which he was entitled to have delivered to him on demand. Upon the production of those delivery orders, the quantities of iron mentioned in them must have been forthcoming; and it seems to me to have been perfectly immaterial whether these quantities had

been previously set apart awaiting the demand for delivery, or whether they were, on the production of the delivery orders, separated from a larger quantity.” Lord Westbury, in dealing with the latter point, said: “Mr. Justice Willes is reported to have said that the factor must be deemed to be a factor *for the sale*. *Fuentes v. Martis*, L. R. 3 C. P. 268. What is stated in the act is, that a factor who is intrusted with the goods, or with a document of title, shall be authorized to deal with the goods in a particular manner. And then the fourth section goes on to define what is meant by a ‘document of title:’ and the definition given is one which will include these orders. What we have to inquire, therefore, in this case is, whether the factor was intrusted by the owner with a possession of a document of title entitling the factor to give possession of the goods. That undoubtedly he

One of the rules of the Chicago Board of Trade provided that in purchases or sales made by a member of the Board of Trade for another, other persons might be substituted for the original purchaser or seller. The plaintiffs bought produce for the defendant and released the seller, but did not substitute any other person in the place of the seller who would have been bound, under the rule, to the purchaser, in the same manner as the origi-

was. If the words of the act had been 'factor for sale,' I should have been of opinion, undoubtedly, that that meant one who has contracted to sell, but has not completed the sale; but has received from his principal a document of title in order to complete the sale, and who, as the recipient of that order, is an agent for the sale, within the meaning of those words. The words 'factor for sale,' however, are not found in the act, and the question simply is this: Were Campbell Brothers intrusted with the possession of a document of title? Undoubtedly they were; and therefore they were authorized to deal with the document in favor of Hertz in the manner they have done. It is perfectly clear that Campbell Brothers would answer the description of factors intrusted with a document of title, although not entitling them, on the face of it, to transfer it by indorsement. The power to deal with the document is a power derived from the enabling clauses in the act, and does not require for that purpose any particular form of indorsement beyond that which enables them to be designated as persons intrusted with the possession of a document of title." *Vickers v. Hertz*, L. R. 2 Sc. & D. Ap. at p. 117 *et seq.* See also, for the Scotch law, 1 Bell's Com. p. 250.

The facts in *Pochin v. Robinows*, Ct. of Sess. Cas. 3d ser. vol. vii. p. 622, are identical with those in *Vickers v. Hertz*, L. R. 2 Sc. & D. 113. The former case, as intimated above, was not decided under the Factors' Acts. The ground of the decision was one relating to agency generally, and was to the effect that where a man intrusts his agent with the actual possession of his goods, or with a document by which possession can at any moment be obtained, and the agent, in abuse of his trust, raises money on his ostensible right from a *bona fide* lender, it is the employer of the agent who should suffer the loss, and not the innocent third party with whom the agent was enabled to contract by the employer's own conduct. In *Vickers v. Hertz*, L. R. 2 Sc. & D. at p. 116, Lord Chelmsford was evidently in doubt as to the soundness of the decision in *Pochin v. Robinows* (*supra*), indepen-

dent of the effect of the Factors' Acts; and we think that, as far as the English law is concerned, the case outside of the Factors' Acts is even more than doubtful, as the very object of the enactment of the Factors' Acts in England was to meet exactly such cases as those of *Pochin v. Robinows*, and *Vickers v. Hertz*. But, as was pointed out in the latter case by Lord Colonsay (at p. 119), while the case came clearly within the scope of the Factors' Acts, and on that ground was well decided, the decision was also in accordance with the common law of Scotland, the Scotch law having "gravitated in that direction for a considerable time previously to those statutes, Mr. Bell laying it down expressly that a factor had the power to pledge his principal's property." Bell, in 1 Com. 5th ed. 483; 7th ed. 517, says: "It has been much questioned, both on the Continent and in Great Britain, what power a factor has to pledge the goods of his principal. In England, at common law, he had no such power. In Scotland it has been decided that he has the power, to the effect of conferring on one who lends money on the security of the goods, an unexceptionable real right; or, of raising to a sub-factor, or other person receiving the goods and advancing money on them, an effectual lien. And, on this point, the law of England has by statute been placed nearly on the footing of the law of Scotland;" citing the Factors' Acts. And, again (5th ed. 250, 7th ed. 270), with reference to the doctrine of reputed ownership, an analogous doctrine as to the law of Scotland is laid down: "The effect produced in England by the statute of 21 James I, c. 19, is in Scotland accomplished by the operation of the common law; and the rule may be stated in this proposition, — that where one is unnecessarily, or by the collusion or gross negligence of the true owner, permitted to give himself an appearance to the world as if he were proprietor of goods and wares not belonging to himself, and this by exercising acts of ownership, and by holding a possession seemingly uncontrolled, his creditors will be entitled to proceed against the goods as if they really belonged to him."

nal seller, there being no other substitution of a contract for the cancelled one than such as existed in the minds of the plaintiffs, to which no outward expression was given, and which consisted merely in their intention to thereafter substitute another seller to take the place of the one they released. The court held that this rule means that when a commission merchant has made a contract for his principal with a third person, and assumes to offset or cancel the contract, he should substitute therefor another equivalent contract with some other person who should be bound to his principal for its performance. The purpose of the rule being, therefore, to provide that when contracts were cancelled and others substituted, the commission merchant, as well as the party bound in the substituted contract to sell or buy, should be liable to the other party for its performance. The rule did not authorize the commission merchant to release the party to the original contract unless he provided some one else to assume the obligation; or, as the rule states it, "substitute some person or persons for the one from or to whom he may have purchased or sold the property originally;" and that in this case there having been no substitution,—no contracts to take the place of those cancelled,—the plaintiffs could not recover.¹

Parties who make sales themselves, in their own name, at their own store, and on commission, having possession of the goods as soon as the sales are made, and delivering them to their customers, are commission merchants as contradistinguished from mere brokers or agents, and were held liable, under the Internal Revenue Act of 1866,² to be liable to a tax as "wholesale dealers," and did not come within the clause of the act which imposed a lighter tax on "commercial brokers."³

A factor who has made advances on cotton, claiming it in the Court of Claims, under the Abandoned and Captured Property Act,⁴ as he has only a special property in it to the amount of his advances, can only recover to the extent of his interest in the cotton, to which extent he is considered as the "owner" within the meaning of the act; but as to the amount beyond his advances, that is in the general owner, in respect to whom the United States has the full defences of set-off, disloyalty, etc., given under the act and its amendments.⁵

¹ *Higgins v. McCrea*, 116 U. S. 671. The rule is well settled, that a written contract made by a factor in his own name for the purchase or sale of goods for his principal will bind the principal, and he may sue or be sued thereon exactly as if he were named in it, for it is treated as the contract of the principal as well as of the

agent. *Higgins v. Senior*, 8 M. & W. 834; *Huntington v. Knox*, 7 Cush. 371; *Taintor v. Prendergast*, 3 Hill, 72; *Ford v. Williams*, 21 How. 287.

² 14 Stat. at Large, 115.

³ *Slack v. Tucker*, 23 Wall. 321.

⁴ 12 Stat. at Large, 820.

⁵ *United States v. Villalonga*, 23 Wall. 35.

In *Warner v. Martin*,¹ the Supreme Court of the United States decided the following points: 1. That a factor has not power to transfer the title of his principal to goods consigned to him for sale, in payment of a precedent debt due from himself; and a creditor who receives the goods under such an arrangement, as well as his vendee, though acting in good faith, and in ignorance of the fact that the goods did not belong to the factor, acquires no title as against the principal. 2. The factor having abandoned the country, the clerk of the factor has no power to sell the goods of the factor's principal, no usage of the trade to do so being shown.²

Under the United States Bankrupt Act of 1841,³ fiduciary debts contracted before the passage of the act constituted no objection to the discharge of the debtor from other debts. A fiduciary creditor was not affected by proceedings in bankruptcy unless he voluntarily came in and proved his debt. Under this act it was held, on demurrer to a plea of bankruptcy by a bankrupt factor, that a balance due from a factor to his principal was not a fiduciary debt within the meaning of that act.⁴

Where goods are consigned to a factor to meet his acceptances as they fell due, and he has funds in his hands to meet a bill accepted by him, drawn by his principal and an accommodation drawer, he is bound to apply the funds to pay that bill. He cannot sue the drawers and maintain that he applied those funds to the payment of the later liabilities of his principal alone. The accommodation drawer has the right to have the funds applied to meet the bills as they become due, and not to have the payment of the bill of which he was one of the drawers deferred to his injury.⁵

The plaintiff, a merchant in Georgia, shipped cotton to the defendants, factors in Liverpool, the defendants accepting the plaintiff's draft against the consignment. When the shipment was

¹ 11 How. 209.

² See *Trueman v. Loder*, 11 A. & E. 589; *Blore v. Sutton*, 3 Meriv. 237; *Combe's Case*, 9 Co. 75; *Palliser v. Orb*, Bunb. 166; *Coles v. Trecothick*, 9 Ves. 236; *Solly v. Rathbone*, 2 Man. & S. 299; *Cockran v. Irlam*, *Id.* 301; *Paterson v. Tash*, 2 Str. 1178; *Maans v. Henderson*, 1 East, 337; *Newson v. Thornton*, 6 East, 17; *McCombie v. Davis*, 6 East, 538; 7 East, 5; *Daubigny v. Duval*, 5 T. R. 604; *Guichard v. Morgan*, 2 Br. & B. 639; *Martini v. Coles*, 1 Man. & S. 140; *Berry v. Williamson*, 8 How. 495.

³ 5 Stat. at Large, 440.

⁴ *Chapman v. Forsyth*, 2 How. 202.

⁵ *Brender v. Phillips*, 16 Peters, 121.

But, where a factor makes advances, or incurs liabilities on a consignment of goods, if there be no special agreement, he may sell the property in the exercise of a sound discretion, according to general usage, and reimburse himself out of the proceeds of the sale; and the consignor has no right to interfere. The lien of a factor for advances and liabilities incurred extends not only to the property consigned, but, when sold, to the proceeds of the sale in the hands of the vendee, and the securities therefor in the hands of the factor. *Drinkwater v. Goodwin*, Cowp. 251; *Haughton v. Matthews*, 3 Bos. & P. 489; *Brown v. McGran*, 14 Pet. 495.

made, and the advance arranged for, no instructions were given by the plaintiff touching the sale of the cotton. It accordingly went to the consignees, as factors for sale, without any other contract than that implied by law as between a principal and a factor making advances; that is to say, that the factor is to make sale of the goods consigned to him according to his own judgment, in the exercise of a sound discretion as to the time and mode of sale, having regard to the usages of trade at the place of sale, and to reimburse himself out of the proceeds for his advances and other balance due him. After the shipment,—namely, on April 20,—the plaintiff wrote the defendants: “If you have any cottons on hand when this reaches you in which I am interested, I wish you to hold them until you hear from me again.” The defendants, on May 24, replied, acknowledging the receipt of the letter of April 20, and adding, “And your wishes in respect of the cotton are noted accordingly.” On July 22 the plaintiff wrote the defendants, acknowledging the receipt of that letter, and saying, “You will please sell my cotton soon after the receipt of this, unless you are of opinion you can do better by holding a little longer.” This letter was received on August 23; but the cotton, in fact, had been sold by the defendants, on a rising market, on June 3. On the plaintiff becoming aware of this, he repudiated the sale, and notified the defendants he would not be bound by it and would hold them responsible. The market having continued to rise, the plaintiff brought an action for damages for a breach of orders by the defendants, and of their duty as factors. The verdict and judgment were for the plaintiff. The judgment was set aside by the Supreme Court,¹ and a new trial was ordered by a divided court, Wayne and Catron, JJ., dissenting.

While there may be some doubt as to whether the majority of the court made a proper application to the case of all the principles upon which they relied, we think that, with one important qualification which we shall notice, there is no question as to the general correctness of those principles, as follows:—

1. As a general rule, it is true that the interpretation of written instruments properly belongs to the court, and not to the jury. But there are cases in which, from the different senses of the words used, or their obscure and indeterminate reference to unexplained circumstances, the true interpretation of the language may be left to the consideration of the jury for the purpose of carrying into effect the real intention of the parties. This is especially applicable to cases of commercial correspondence, where the real objects and intentions and agreements of the

¹ *Brown v. McGran*, 14 Peters, 479.

parties are often to be arrived at only by allusions to circumstances which are but imperfectly developed. And this is true even though the court might, in its discretion, have assumed upon itself the right and duty of construing the correspondence.

2. Wherever a consignment is made to a factor for sale, the consignor has a right generally to control the sale thereof, according to his own pleasure, from time to time, if no advances have been made or liabilities incurred on account thereof; and the factor is bound to obey his orders. This arises from the ordinary relation of principal and agent. If, however, the factor makes advances or incurs liabilities on account of the consignment, by which he acquires a special property therein, then the factor has a right to sell so much of the consignment as may be necessary to reimburse such advances or meet such liabilities, unless there is some existing agreement between himself and the consignor which controls or varies this right. Thus, for example, if, contemporaneous with the consignment and advances or liabilities, there are orders given by the consignor which are assented to by the factor that the goods shall not be sold until a fixed time, in such a case the consignment is presumed to be received by the factor subject to such orders; and he is not at liberty to sell the goods to reimburse his advances or liabilities until after that time has elapsed. The same rule will apply to orders not to sell below a fixed price, unless, indeed, the consignor shall, after due notice and request, refuse to provide any other means to reimburse the factors. And in no case will the factor be at liberty to sell the consignment contrary to the orders of the consignor, although he has made advances or incurred liabilities thereon, if the consignor stands ready and offers to reimburse and discharge such advances and liabilities. On the other hand, where the consignment is made generally, without any specific orders as to the time or mode of sale, and the factor makes advances or incurs liabilities on the footing of such consignment, then the legal presumption is that the factor is intended to be clothed with the ordinary rights of factors to sell in the exercise of a sound discretion at such time and in such mode as the usage of trade and his general duty require, and to reimburse himself for his advances and liabilities out of the proceeds of the sale; and the consignor has no right by any subsequent orders [*unless assented to or acquiesced in by the consignee*, we would suggest], given after advances have been made or liabilities incurred by the factor, to suspend or control this right of sale, except so far as respects the surplus of the consignment, not necessary for the reimbursement of such advances or liabilities. Of course this right of the factor

to sell to reimburse himself for his advances and liabilities applies with stronger force to cases where the consignor is insolvent, and where, therefore, the consignment constitutes the only fund for indemnity.

While we think the above position, except as we have above qualified it, is not sound, we fully agree with the majority of the court in the following, which is the third of their positions, but which, as stated by them, implies a very strong doubt as to the correctness of their holding that the acquiescence in and assent to, by the consignees, of the orders of the consignors, is not binding on the consignees if they have incurred any liability in respect to the consignment.

3. *Supposing the sale made by the defendants on June 3 to have been tortious, and in violation of orders*, the plaintiff had his election either to claim damages for the value of the cotton on that day, as a case of tortious conversion, or for the value of the cotton on August 23 following, when the letter of the plaintiff of July 22 was received, which authorized a sale. If the price of cotton was higher on that day than at any intermediate period he was entitled to the benefit thereof. If, on the other hand, the price was then lower, he could not justly be said to be damnified to any extent beyond what he would lose by the difference of the price of cotton on June 3 and the price on August 23.

The advance in this case was made to the plaintiff, not by the payment of any money, but by the acceptance of the plaintiff's draft by the defendants' New York house, who recouped themselves by drawing on the Liverpool house at sixty days' sight, this bill being accepted only on June 3, the day on which they sold the cotton, so that they would not be under any cash advance against the consignment until the following August. The jury treated the defendants' letter of May 24 in connection with the plaintiff's letter of April 20 as an agreement with the plaintiff not to sell the cotton until they received further orders; and the court, in effect, approve of the construction put by the jury upon those letters. Of course, on undoubted principles of law applicable to the case, it was quite within the power of the defendants to have refused assent to the proposition made to them in the plaintiff's letter of April 20, in which case they would have exercised such rights of selling as pertain to factors under such circumstances, or they could have required additional security; but having adopted neither of these courses, and having, as the jury found, assented to the plaintiff's request, we think this did amount to an "existing agreement between themselves and the consignor which controlled or varied their rights." Having con-

sented to hold the cotton according to the terms of the consignor's letter, and having against their assent, acquiescence, and agreement violated their orders, — thus, first, by their acquiescence, lulling the consignor into inaction, and rendering an offer, confessedly within the power of the consignor to make, of a “discharge and reimbursement of the advances and liabilities,” and then violating their agreement, which was based on a clear legal consideration, — we think, in the words of the majority of the court themselves, that the sale was “tortious and in violation of orders;” and we are not surprised that, on this point, two of the judges of the Supreme Court dissented from the view of the majority, and agreed with that of the court below.¹

¹ See *Turner v. Yates*, 16 How. 14, where a question as to the meaning and effect of correspondence was submitted to the jury, as in *Brown v. McGran*, 14 Pet. 479. The authorities cited in this latter case do not sustain it on the point where we think it is wrongly decided. In neither of the two cases relied on did the same question, or a similar one, arise. In *Pothonier v. Dawson*, Holt, 383, Gibbs, C. J., held, that, as a general proposition, a right of lien gives no right to sell the goods. But when goods are deposited by way of security, to indemnify a party against a loan of money, it is more than a pledge. The lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade. The contract, in such case, may be inferred to be, “If I [the borrower] repay the money, you must redeliver the goods; but if I fail to repay it, you may use the security I have left to repay yourself.” The other case, *Graham v. Dyster*, 6 Mau. & S. 1, simply holds that a factor who had the power to sell goods, had not the power to pledge them. Lord Ellenborough shows that where goods are consigned to a broker, with power to sell them at his discretion, the shippers stipulating that they should be at liberty to draw on the broker by way of advance, the broker had power given to him to regulate the time and place of disposal, the price, and all other particulars incident to the sale, and the shippers could not object to any mode of sale which the broker might adopt, in order to reimburse himself for his advances. But this does not affect the case, as in *Brown v. McGran*, 14 Pet. 479, where, by agreement between the parties, the consignee's rights and powers are restricted. In *Marfield v. Goodhue*, 2 Coms. 62, the Court of Appeals of New York refused to follow *Brown v. McGran*, 14 Pet. 479, even, outside of the question of the factor's powers being restricted by that

which was held to constitute an agreement between the consignor and consignee. In *Marfield v. Goodhue*, 3 Coms. at p. 72, the court say: “Where goods are sent to a factor for sale, without any limitation or instructions as to the terms or time of sale, he is at liberty to sell as in the exercise of a sound discretion he shall deem proper for the interest of his principal. The factor in such a case is intrusted with the exercise of a discretion for the benefit of his principal and not for his advantage, and that discretion the principal has a right to control. But after the factor has this authority, to be exercised exclusively for the benefit of his principal, he makes advances, and then his principal becomes satisfied that his interest will be promoted if the sale be delayed, and he orders his factor not to sell. The Chief Justice instructed the jury that such an order was powerless, and in no respect limited the authority of the factor. Can this be so? The authority when given to the factor was given for the exclusive benefit of the principal. The interest of the factor was not to be regarded at all in the exercise of the authority. Then the factor makes an advance upon the credit of the goods, and of his principal; is he not, after that, as much bound as he was before, to have solely in view the interest of his principal when he sells; or is he at liberty, afterwards, to consult his own interest instead of that of his principal? After the advance, the principal has good reason to believe that a delay in selling will be advantageous to him, and he so informs his factor; is there any hardship in requiring of the factor, if he is unwilling to obey the order of his principal, to say to him, ‘As you have revoked my authority to sell at my discretion for your benefit, I shall sell at my discretion for my own benefit, unless you forthwith repay my advances’?” We think that the mistake made by the court in *Brown v. McGran*, 14 Pet. 479,

Certain cases of wine were ordered by L. of the plaintiff, and were shipped by the plaintiff, consigned to L., who deposited the bill of lading with the defendant, a wharfinger, with directions to take delivery and warehouse the wine on L.'s account. The wine, on its arrival, was entered at defendant's wharf in L.'s name, subject to a stop for freight. L. afterwards refused to accept the wine, on the ground that it was not according to contract. The plaintiff agreed to take it back, and L. promised to send a delivery order to enable the plaintiff to obtain it; but, on the same day, L. indorsed the bill of lading to M., which M. took to the defendant's wharf and procured a transfer of the wine into his own name. The plaintiff was afterwards informed by L. that the wine was at the disposal of the plaintiff, but subject to charges amounting to £17 14s. 9d., and £5 for loss of profit. At an interview between M. and the plaintiff, M. offered to give up the wine on payment of the above sums. The plaintiff tendered the former sum, which M. would not accept. The plaintiff's attorney afterwards offered to the defendant to pay all charges, and to indemnify him against the claim of any other person. The defendant refused to deliver the wine to the plaintiff, alleging that he had given warrants to M. The wine was ultimately delivered to a third person by M.'s order. M. had, in fact, paid the freight, and obtained warrants to him or his order. At the trial before Cockburn, C. J., the jury found that the transaction between M. and L. was colorable, and with knowledge on the part of M. of the intention of L. to deprive the plaintiff of the wine. A verdict was found for the plaintiff, with leave to move to enter a verdict for the defendant, power being reserved to the court to draw inferences of fact. The court held that the defendant received the

494, *et seq.*, is mainly in disregarding the effect, after advances have been made, of the agreement of the factor to comply with the request of the shipper to defer making the sale. Aside of that, there is not a very material difference between *Brown v. McGran*, 14 Pet. 479, and *Marfield v. Goodhue*, 3 Coms. 62. In the former case, the language is: "And in no case will the factor be at liberty to sell the consignment contrary to the orders of the consignor, although he has made advances, or incurred liabilities thereon, *if the consignor stand ready, and offers to reimburse and discharge such advances and liabilities.*" P. 495. And in *Marfield v. Goodhue*, 3 Coms. 62, nearly the same thing, in effect, is also held; or literally, that the factor may sell, unless on demand the consignor, pay the advances. So that, on this point, the difference is merely as to the party upon whom the

initiative as to the payment is cast. But, on the point, where we have expressed the opinion that *Brown v. McGran*, 14 Pet. 479, is wrongly decided, we find the court in *Marfield v. Goodhue*, 3 Coms. 62, 75, *et seq.*, sustains our view, and on this important point, where the case essentially differs with *Brown v. McGran*, we think it clear that *Marfield v. Goodhue* is the better decided of the two cases. See *Bell v. Palmer*, 6 Cow. 128; *Parker v. Brunker*, 22 Pick. 44. In this latter case it was held that a commission merchant, having received goods to sell at a certain limited price, and made advances upon them, has a right to reimburse himself by selling them at the fair market price, though below the limit, if the consignor has refused, upon application, and after a reasonable time, to repay the advances.

wine as bailee to L., and, after the payment of the freight, could have no better title than his bailor; that, by the finding of the jury, M. had no better title than L.; and, as the plaintiff had tendered the amount of charges both to M. and the defendant, the plaintiff's title was as valid against the defendant as it would have been against L.; and that the defendant was liable to the plaintiff for the value of the wine.¹

The receipt of a warehouseman for a quantity of wheat, given in consideration of a sum of money, no wheat being delivered, does not enable the promisee to maintain replevin against a third person for wheat held by the third person in that warehouse; the plaintiff showing no property in the wheat.²

Where, for advances made by the plaintiffs to H. L., for goods, his brother S. L., a warehouseman, gave warehouse receipts for such goods to the plaintiffs, which goods were sold and delivered by H. L. and the plaintiffs to the defendants, for the plaintiffs; it is no defence for the defendants, in an action for the price, to say that the plaintiffs are still the holders of the outstanding receipts of S. L. The existence of these facts does not authorize the defendants to resist the payment of the price of property they had purchased, and the possession of which has not been disturbed. S. L. had no title to the property, nor any power to sell it, nor any claim on the price. At most, he had only a lien, which he might never claim to exert, and from which the purchasers have experienced no injury.³

Wharfingers, warehousemen, and commission merchants, having goods in their possession, may insure them in their own names, and in case of loss may recover the full amount of in-

¹ *Batut v. Hartley*, L. R. 7 Q. B. 594. See *Cheesman v. Exall*, 6 Ex. 341; *Ogle v. Atkinson*, 5 Taunt. 759; *Gurney v. Behrend*, 2 E. & B. 622; *Wilson v. Anderson*, 1 B. & Ad. 450; *Cuming v. Brown*, 9 East, 506; *Meyerstein v. Barber*, L. R. 4 H. L. 317; *Brandt v. Bowlby*, 2 B. & Ad. 932; *Williams v. Everett*, 14 East, 582; *Walker v. Roston*, 9 M. & W. 411; *Wood v. Leadbitter*, 13 M. & W. 838.

² *Jackson v. Hall*, 14 How. 525.

³ *McCullough v. Roots*, 19 How. 349. See, also, *Holly v. Huggerford*, 8 Pick. 73; *Vibbard v. Johnson*, 19 Johns. 77; *Wanzer v. Truly*, 17 How. 584. A purchaser with knowledge that the goods purchased are claimed by a third person, if he voluntarily pays the price of the goods to such third person, cannot afterwards, in a suit brought against him by the vendor for the price, set up the want

of title in the vendor, and that he had paid the price to the true owner, as a defence. It is not competent for the purchaser to dispute the title of his vendor, unless he has been charged at the suit of another person, who has, after contestation, shown a better title. The principle is analogous to the devise of a house by A., who is in possession, claiming title, to B. The latter receives the possession, and enjoys the premises by the permission, and on the letting of A. In an action for the rent, B. cannot set up that A. has nothing in the premises, and that he has paid the rent to C. voluntarily. If C. had recovered the rent, and substantiated his title, then it would be a good defence; otherwise, not. *Vibbard v. Johnson*, 19 Johns. 77. And see *Heermance v. Vernoy*, 6 Johns. 5; *Sweet v. Colgate*, 20 Johns. 196.

surance, for the satisfaction of their own claims first, and hold the residue for the owners.¹

It is laid down in *Railroad Co. v. Manufacturing Co.*² that the rule which is applicable while goods are in process of transportation by a carrier from the place of their receipt to the place of their destination, is that, in the absence of any special contract, it is the duty of the carrier to carry safely to the end of his line and to deliver to the next carrier in the route beyond. It is there alleged that this rule of liability is adopted generally by the courts in this country, although in England, at the present time, and in some of the States of the Union, the disposition is to treat the obligation of the carrier who first receives the goods as continuing throughout the entire route. The rule, it is claimed, that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is just and reasonable; but that public policy, however, requires that this rule should be enforced, and will not allow the carrier to escape responsibility on storing the goods at the end of his route, without delivery or an attempt to deliver to the connecting carrier. If there be a necessity for storage, it will be considered a mere accessory to the transportation, and not as changing the nature of the bailment. It is very clear that the simple deposit of the goods by the carrier in his depot, unaccompanied by any act indicating an intention to renounce the obligation of a carrier, will not change or modify his liability. It may be that circumstances may arise after the goods have reached the depot which would justify the carrier in warehousing them; but if he had reasonable grounds to anticipate the occurrence of these adverse circumstances when he received the goods, he cannot by storing them change his relation towards them.

These principles are stated as above and were applied in *Railroad Co. v. Manufacturing Co.*³ where wool was shipped at Jackson for Buffalo, and was taken by the railroad to Detroit, whence it was to be forwarded by steamer to Buffalo. It was carried by the road to Detroit, and remained in the depot of the railroad for

¹ *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527; *Waters v. Monarch Assurance Co.*, 5 El. & Bl. 870; *London & North Western Ry. Co. v. Glyn*, 1 El. & Bl. 652; *DeForest v. Fulton Insurance Co.*, 1 Hall, 136; *Siter v. Marrs*, 13 Pa. St. 219. Such policies usually contain such language, covering the goods, as "their own or held by them in trust," and the assured become trustees for the owners of the goods for such excess as may be over their own claims against the

goods. *The London & North Western Ry. Co. v. Glyn*, 1 El. & Bl. 652. See *Lidaways v. Todd*, 2 Stark. 400; *Roper v. Holland*, 3 A. & E. 99; *Carruthers v. Shedden*, 6 Taunt. 14; *Irving v. Richardson*, 2 B. & Ad. 193; *Dalby v. The India & London Life Assurance Co.*, 15 C. B. 365; *Snow v. Carr*, 61 Ala. 363; *Durand v. Thouron*, 1 Port. 238; *Ratie v. Durand*, *Id.* 251.

² 16 Wall. 313.

³ *Ibid.*

six days, when it was destroyed by an accidental fire, not the result of any negligence on the part of the railroad company. During all the time the wool was in the depot it was ready to be delivered for further transportation by the steamers, which were unable, from the accumulation of freight, to receive it. The liability of the railroad was held to be that of carriers, and not of warehousemen, and the judgment of the Circuit Court for Connecticut against them for the loss, was affirmed by the Supreme Court of the United States.¹

¹ As this subject is only collateral to that of sales we intended to have discussed it in a note to this Part; but as the question in this country is one of the highest importance, not only to railroad companies, but to merchants generally in connection with their sales and shipments

of goods, and as the decisions in this country as a whole, are not by any means in a satisfactory state, we devote a separate Part for the exhaustive consideration of the subject. See *post*, Vol. II., Book III., Part II.

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